(1) Supreme Court, U.S.
FILED

00 . 947 SEP 27 2000

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 2000

J. L. WILSON,

Petitioner

v.

JAMES NEAL, DIRECTOR
OF THE ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL CONDUCT

Respondent

On Petition For A Writ of Certiorari
To The Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

DARRELL F. BROWN #72102
Counsel of Record
807 West Third Street
Little Rock, Arkansas 72201
(501) 376-1845

JOHN W. WALKER #64046
1723 S. Broadway
Little Rock, Arkansas 72206
(501) 374-3758
Attorneys for Petitioner

114pp

QUESTIONS PRESENTED FOR REVIEW

1. Are the constitutional rights of the petitioner (and all similarly situated citizen attorneys) to enjoy the federally guaranteed protections of due process and the equal protection of the laws being denied, when the Arkansas Supreme Court or the lower state's courts (in an attorney disciplinary proceeding) are allowed by the system adopted by the sate court to exercise unfettered and unlimited discretion in fashioning a sanction of "suspension" of the attorney's license to practice law (in a disbarment proceeding), when the period of such sanction of "suspension" exceeds the limitation of the period of years that the Arkansas Supreme Court's published Procedures for Regulation the Professional Conduct of Attorneys at Law imposes upon the power and authority the Arkansas Supreme Court's Committee on Professional Conduct to impose such sanction, when the court is disciplining such attorneys?

PARTIES TO THE PROCEEDING

The parties to the proceeding before Arkansas Supreme Court are the following:

Petitioner:

J. L. Wilson,
Lexa, Arkansas

Respondent:

James Neal, Director
Arkansas Supreme Court
Committee on Professional Conduct
Little Rock, Arkansas.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

1. Criminal Proceeding 2

2. Disciplinary Proceeding 3

   A. First Circuit Court Ruling 4

   B. Second Circuit Court Ruling 5

   C. Federal Court Removal and Rulings 6

   D. Third Circuit Court Ruling 6

   E. Fourth Circuit Court Ruling 7

3. Practical Effect of Disciplinary Proceeding 9

PAGE

REASONS WHY CERTIORARI SHOULD BE GRANTED: 11

The federally guaranteed due process and equal protection rights of the petitioner (and all similarly situated Arkansas attorney/citizens) are being blatantly violated by the exercise of unfettered and unlimited discretion by the judges and justices of the State of Arkansas in imposing sanctions in attorney disciplinary proceedings were the disbarment of the attorney is sought, especially when these judges and justices have ruled that they can ignore the express limitations of time on imposing suspension sanctions in attorney disciplinary proceedings, as set out in the published procedures adopted by the Arkansas Supreme Court. 11

A. The Exercise of Absolute Discretion Results in an Unconstitutional Outcome 11

1. Unique Evidentiary Record 11

2. Unique Procedural Record 13

B. Rulings by Arkansas' Courts in Similar Attorney Disciplinary Matters Have Reached Disparate Results 15

A. A Comparison of the *Wilson* and *Matthews* Proceedings 16

2. A Comparison of the *Meurer* and *Hollingsworth* Proceedings 18

C. The Comity Usually Accorded by this Court to State Court Attorney Disciplinary Proceedings is not a Bar to

PAGE

the Court's Need to Review the Judgment Involved Here 20

D. This Court Must Review the Petitioner's Federal Constitutional Claims, Because the Arkansas Court Has Refused to Do So 23

E. The Rules of Construction for State Court Disciplinary Rules and Procedures Must be Governed by Federal Constitutional Standards 25

CONCLUSION 30

APPENDIX 1 ..... App. 1

APPENDIX 2 ..... App. 20

APPENDIX 3 ..... App. 22

APPENDIX 4 ..... App. 24

APPENDIX 5 ..... App. 38

APPENDIX 6 ..... App. 53

APPENDIX 7 ..... App. 54

APPENDIX 8 ..... App. 56

APPENDIX 9 ..... App. 70

TABLE OF AUTHORITIES

CASES: **PAGE**

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 20

Batson *v. Kentucky*, 426 U.S. 79, 106 S.Ct. 1712,
90 L.Ed.2d 69 (1986) 2

Broderick v. Oklahoma, 413 U.S. 601,
93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) 26

Bynum v. Savage, 312 Ark. 137,
847 S.W.2d 705 (1993) 25

Chambers v. Nasco, 501 U.S. 32,
111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) 23

City of Chicago v. Morales, 527 U.S. 41 (1999) 29

Cole v. Arkansas, 333 U.S. 196 (1948) 25

DeRolph v. State, 728 N.E.2d 993 (Ohio 2000) 15

E. G. Cox v. Louisiana, 379 U.S. 536 (1995) 29

Ex Parte Bradley, 74 U.S. (7 Walls) 364,
19 L.Ed. 214 (1868) 23

Ex Parte Garland, 71 U.S. (4 Walls) 333,
18 L.Ed. 366 (1860) 22

Grayned v. City of Rockford, 408 U.S. 104, 108,
92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) 29

Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708,
93 L.Ed.2d 649 (1987) 3

In Re Gault, 387 U.S. 1, 87 S.Ct. 1428,
18 L.Ed2d 527 (1967) 27

PAGE

In the Matter of Abrams, 521 F.2d 1094 (3rd Cir. 1975), cert. denied, 423 U.S. 1038 (1975) 13

In *the Matter of Meurer*, 337 Ark. 1608, 990 S.W.2d 552; 338 S.W.2d 373, 993 S.W.2d 917; 338 Ark. 601, 999 S.W.2d 196 (Ark. 1999) 16

In the Matter of Ruffalo, 390 U.S. 554, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) 12, 21, 23

In the Matter of Thalheim, 853 F.2d 383 (5th Cir. 1988) 13, 14, 23, 26, 28

Konigsberg v. State Bar of California, 353 U.S. 252 (1957) 20

Lake View School District No. 25 v. Huckabee, 340 Ark. 481, 10 S.W.3d 892 (Ark. 2000) 15

Kifer *v. Liberty Mutual Ins. Co.*, 777 F.2d 1325 (C.A.. 8 Ark. 1985) 18

Little v. Streater, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981) 16

Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1876) 22

Neal v. Hollingsworth, 338 Ark. 251, 992 S.W.2d 771(Ark.. 1999) 16

Neal v. Matthews, 342 Ark. ___, ___ S.W.3d ___, 2000 WL 1683376 (Ark. 2000) 10, 16

PAGE

Neal v. Wilson, 316 Ark. 588,
873 S.W.2d 552 (1994) 1, 5

Neal v. Wilson, 321 Ark. 70,
900 S.W.2d 177 (1995) 5

Neal v. Wilson, 920 F.Supp 976 (E.D. Ark. 1996) ... 1, 4, 6, 24

Neal v. Wilson, 112 F.3d 351 (8th Cir.1997) 1, 4,6

Resolution Trust Corp. v. Bright, 6 F.2d.3d 336
(5th Cir., 1993) 30

Rose v. Council for Better Education,
790 S.W.2d 186 (Ky. 1989) 15

Smiley v. Kansas, 196 U.S. 447, 455,
25 S.Ct. 289, 49 L.Ed. 546 (1905) 29

Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625,
17 L.Ed.2d 574 (1967) 22

Standing Comm. On Discipline v. Ross,
735 F.2d 1168 (9th Cir.) cert. denied
469 U.S. 1081, 105 S.Ct. 583,
83 L.Ed.2d. 692 (1984) 23

Strickner Poultry Corp. v. U.S.,
295 U.S. 495 (1935) 29

Supreme Court of Virginia v. Consumers Union, Inc.
446 U.S. 719 (1980) 28

Thread v. United States, 354 U.S. 278 (1957) 20

Tucker v. Lake View School District No. 25,
323 Ark. 693, 917 S.W.2d 530 (Ark. 1996) 15

PAGE

United States v. Stoneberger, 805 F.2d 1391 (9th Cir. 1986) 13

United States of America v. Jimmie L. Wilson, Case No. LR-CR-84-100 2

United States v. Wilson, 806 F.2d 171 (8th Cir. 1986) 3

United States v. Wilson, 815 F.2d 53 (8th Cir. 1987) 3

United States v. Wilson, 853 F.2d 606 (8th Cir. 1988) 3

United States v. Wilson, 861 F.2d 514 (8th Cir. 1988) 3

United States v. Wilson, 884 F.2d 1121 (8th Cir. 1989) 3

Wilson v. Neal, 321 Ark. 70, 900 S.W.2d 177 (1995) 1, 6

Wilson v. Neal, 327 Ark. 883, 939 S.W.2d 312 (1997) 1, 6

Wilson v. Neal, 329 Ark. 947 S.W.2d 338 (1997) 1, 6

Wilson v. Neal, 332 Ark. 148, 964 S.W.2d 199 (1998) 1, 6

Wilson v. Neal, 341 Ark. 282, 16 S.W.3d 228 (2000) ..... passim

CONSTITUTIONS:

United States:

First Amendment 26

Fourteenth Amendment ..... passim

PAGE

Arkansas:

Amendment 24 of the Arkansas Constitution 21

Article 7 of the Arkansas Constitution 21

STATUTES:

United States:

18 U.S.C. §558 3

18 U.S.C. §581 2

18 U.S.C. §641 ..... 2, 3

28 U.S.C. §1257 1

RULES:

American Bar Association's Model Standards for Imposing Lawyer Sanctions 26

Arkansas Rules of Criminal Procedure 9

Model Rules of Professional Conduct, Rule 8.4(b) 5, 22, 27, 29

Procedures Regulating Professional Conduct of Attorneys at Law, Section 5 ..... passim

Procedures Regulating Professional Conduct of Attorneys at Law, Section 7 ..... passim

PETITION FOR WRIT OF CERTIORARI

Petitioner, J. L. Wilson, respectfully petitions this Court to issue a writ of certiorari to review the final judgment of the Supreme Court of the State of Arkansas (that was entered in this case on May 11, 2000) in this nearly 10 year long attorney disciplinary proceeding.

OPINIONS BELOW

The latest opinion (Appendix 1) in this attorney disciplinary proceeding was rendered by the en banc panel of the Arkansas Supreme Court on May 11, 2000 and is reported at 341 Ark. 282, 16 S.W.3d 228 (*Wilson VI*). The denial of petitioner's Petition for Rehearing (Appendix 3) is not officially reported, but was issued on June 29, 2000. The denial of petitioner's Motion to Stay or to Withdraw Mandate is not officially reported, but was issued on September 7, 2000.

The five prior decisions rendered by the Arkansas Supreme Court in this one attorney disciplinary proceeding are reported at 316 Ark. 588, 873 S.W.2d 552 (Ark. 1994) (*Wilson I*)(Appendix 4); 321 Ark. 70, 900 S.W. 2d 177 (Ark. 1995)(*Wilson II*)(Appendix 5); 327 Ark. 783, 939 S.W.2d 312 (Ark. 1997)(*Wilson III*)(Appendix 6); 329 Ark. 125, 947 S.W.2d 338 (Ark. 1997) (*Wilson IV*)(Appendix 7), and 332 Ark. 148, 964 S.W.2d 199 (Ark.1998)(*Wilson V*)(Appendix 8). [1]

JURISDICTION

The Supreme Court of Arkansas entered its judgment on May 11, 2000. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257.

---

1 This attorney disciplinary proceeding was also removed to the federal courts by the petitioner, in a civil rights case, reported as *Neal v. Wilson*, 920 F.Supp. 976 (E.D. Ark. 1996), *affirmed*, 112 F.3d 351 (8th Cir. 1997).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

1. Criminal Proceedings. Petitioner was licensed to practice law by the State Supreme Court of Arkansas in 1973. In 1984, petitioner was indicted by a federal grand jury for Eastern Arkansas for alleged violations of various federal statutes associated with petitioner's farm operation, not with his law practice. Petitioner was accused of one count of conspiracy and various counts of violations of 18 U.S.C. §581 and 18 U.S.C. §641.

Petitioner was brought to trial in the Federal District Court, Eastern District of Arkansas, Eastern Division, in 1985, and he was convicted in the cause styled *United States of America v. Jimmie L. Wilson*, Docket No. LR-CR-84-100. Petitioner appealed this conviction to the United States Court of Appeals for the Eighth Circuit, and the decision in that initial appeal is found at 806 F.2d 171 (8th Cir. 1986). The Eighth Circuit Court of Appeals affirmed the conviction of petitioner. Petitioner then filed a *petition for a writ of certiorari* to this Court in 1986 and 1987.

This Court had under consideration, at the time of petitioner's original trial, the cause of *Batson v. Kentucky,* 426 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). This Court later found that it was a violation of the Fourteenth Amendment to the

United States Constitution for government counsel to use peremptory challenges in a racially biased manner. Subsequently, in *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), this Court held that, indeed, *Batson* applied retroactively.

At the time the decisions were rendered by this Court in *Batson* and *Griffith*, petitioner's *petition for a writ of certiorari* was pending before this Court. Therein the petitioner also alleged the constitutional misuse of peremptory challenges in his criminal prosecution. Upon two remands to the district court and after a second appeal to the Eighth Circuit Court of Appeals, the Eighth Circuit found a *Batson* violation and vacated its previous affirmance of *United States v. Wilson,* which is found at 806 F.2d 171 (1986). See, *United States v. Wilson*, 815 F.2d 53 (8th Cir. 1987); *United States v. Wilson,* 853 F.2d 606 (8th Cir. 1988); *United States v. Wilson,* 861 F.2d 514 (8th Cir. 1988); and *United States v. Wilson*, 884 F.2d 1121 (8th Cir. 1989).

In August 1990, while awaiting retrial, a plea bargain was reached between the petitioner and the United States. Petitioner, on August 2, 1990, entered a plea of guilty to *information* charging him with five misdemeanor counts. These misdemeanor counts were modified to eliminate all elements of culpability from 18 U.S.C. §558 and 18 U.S.C. §641, except the "knowing" element. Petitioner was later sentenced to four and one-half months in federal prison beginning on February 25, 1991. No fine was levied against the petitioner and he was not ordered to make restitution..

2. Disciplinary Proceeding. While serving his sentence at the Federal Prison Farm at Texarkana, Texas, petitioner received from the respondent, through the general mail, notice of a pending disciplinary action against him by the Arkansas Supreme Court's Committee on Professional Conduct (hereinafter referred to as "Committee"). Petitioner objected to the initiation of these disciplinary proceedings on the basis of violations of his constitutional rights to due process; specifically, that he was temporarily incarcerated; that he would be out of prison in a short time and that the consummation of disciplinary proceedings under these circumstances was a denial of his right to be present, to hire

an attorney, to defend himself at the proceeding, to present witnesses, and to cross examine. After denying petitioner's petition for an extension or continuation of the disciplinary process, the State of Arkansas proceed to conduct a hearing, *in absentia,* during petitioner's incarceration. However, the Committee did not render a decision until July 22, 1991, wherein it recommended the petitioner's disbarment. Petitioner was released from federal incarceration on June 24, 1991. Petitioner would have had ample time and opportunity to present himself and to defend against the charges at a hearing before the Committee between June 24, 1991 (his date of release) and July 22, 1991 (the date of the decision of the Committee), but the Committee denied the petitioner the right to such an appearance or a hearing.

On October 9, 1991, this disciplinary action was begun by the respondent's filing of a complaint against the petitioner in the Circuit Court of Phillips County, Arkansas, pursuant to the provisions of Section 5.G of the "then existing" Arkansas Procedures Regulating Professional Conduct of Attorneys at Law (hereinafter referred to as "Procedures"). Therein, the petitioner was charged with alleged violations of the Arkansas Model Rules of Professional Conduct (hereinafter referred to as "Model Rules"), specifically, Rule 8.4(b), and the Committee sought his disbarment. Petitioner, in defense of this action for disbarment, filed an answer and a Motion to Dismiss. Over the nearly 10 year period of time, between 1991 and the present, the Committee's disciplinary proceeding against the petitioner has been reviewed, in part or in whole, by the Arkansas Supreme Court at least six times. This disciplinary proceeding has also been the subject of a Petition for Removal to the United States District Court for the Eastern District of Arkansas and an appeal of the denial of the Petition for Removal to the Eighth Circuit Court of Appeals. See, *Neal v. Wilson*, 920 F.Supp. 976 (E.D. Ark. 1996). *affirmed*, 112 F.3d 351 (8th Cir. 1997).

A. First Circuit Court Ruling. In the beginning, the two elected circuit judges serving in Phillips County, Arkansas recused and the Arkansas Supreme Court appointed a special circuit judge to conduct these disciplinary proceedings. The petitioner originally objected to the prosecution of this disciplinary action by the Committee on the basis that is was barred, because the statute of

limitations had run and other constitutionally based defenses. The petitioner's actions upon which this disbarment proceedings were based occurred in 1981 and 1982. The complaint to disbar the petitioner was filed by the respondent, in 1991; some nine to ten years later. Petitioner contended that disciplinary proceedings were an *action* under Arkansas law, and that such proceeding should have been brought within five years of 1982. In this first instance, at the trial court hearing, the petitioner prevailed, and the respondent appealed. In *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994) (*Wilson I*), the Supreme Court of Arkansas *reversed* the dismissal of all charges against the petitioner and ordered a new trial in this disciplinary proceeding, on remand. As a result of this decision by the Arkansas Supreme Court, the specially appointed circuit judge recused from further participation in these disciplinary proceedings.

B. Second Circuit Court Ruling. On remand, the then recently elected circuit judge serving in Phillips County, Arkansas, stated that he would take jurisdiction over this disciplinary proceeding. The respondent objected to such proposed action because he asserted that the Arkansas Supreme Court had appointed another special circuit judge to preside, on remand, in this matter. After the elected circuit judge held a hearing, he found the petitioner guilty of the violations of Model Rule 8.4(b) and he rendered his decision by the issuance to the petitioner of a written reprimand and a letter of warning. Finding that the "elected" circuit judge's punishment imposed upon the petitioner was not as severe as he had requested, the respondent filed a *petition for a writ of certiorari* to the Arkansas Supreme Court. The Arkansas Supreme Court promptly issued the *writ of certiorari*. In *Neal v. Wilson*, 321 Ark. 70, 900 S.W.2d 177 (Ark. 1995) (*Wilson II*), the Supreme Court of Arkansas *reversed* and voided the decision of the duly elected circuit judge of Phillips County, Arkansas, and held that this elected circuit judge's ruling was void *ab initio*. However, two justices of the Arkansas Supreme Court strongly dissented and stated that they believed that the elected circuit judge had jurisdiction to preside at the disciplinary proceeding, unless he recused. The contention of the State in this second appeal was that the Arkansas Supreme Court, in this particular case, had the right to appoint a special circuit judge to preside (in lieu of the properly

elected judge) to adjudicate this cause – which was a position by the respondent that was a first in the courts of Arkansas.

C. Federal Court Removal and Rulings. Believing that his civil rights had been violated by this second reversal by the Arkansas Supreme Court in *Wilson II*, the petitioner filed to remove this disciplinary proceeding to the United States District Court for the Eastern District of Arkansas, wherein the petitioner named, as defendants, the five members of the Arkansas Supreme Court (who formed the "majority" that had ruled against him in *Wilson II*), the respondent and the special circuit judge appointed by the Arkansas Supreme Court to hear this case. All of the federal judges for the Eastern District of Arkansas recused from participating in this removal matter, and the chief judge of the Western District of Arkansas was appointed to preside over this matter. That federal judge decided that the actions of these defendants had not violated the civil rights of the petitioner and the Eighth Circuit agreed by affirming the trial judge's decision on the petitioner's appeal. See, *Neal v. Wilson*, 920 F.Supp. 976 (E.D. Ark. 1996), *affirmed*, 112 F.3d 351 (8th Cir. 1997). This matter was then transferred back to the Arkansas state courts.

D. Third Circuit Court Ruling. On remand, the Arkansas Supreme Court appointed still a third special circuit judge to preside in this disciplinary proceeding. That special judge (who is still the presiding judge over this matter in the trial court in Arkansas) summarily entered an order disbarring the petitioner and the petitioner appealed. In *Wilson v. Neal*, 327 Ark. 883, 939 S.W.2d 312 (Ark. 1997) (*Wilson III*), the Supreme Court extended the time for filing briefs because of petitioner's legislative duties as a member of the Arkansas House of Representatives. In *Wilson IV*, cited as *Wilson v. Neal*, 329 Ark. 947 S.W.2d 338 (Ark.1997), the court denied the petitioner a *writ of mandamus* in order to settle the record. Finally, in *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (Ark. 1998) (*Wilson V*), the Supreme Court of Arkansas reversed the specially appointed circuit judge's decision to summarily disbar the petitioner. This decision to reverse and remand was made by the Arkansas Supreme Court upon its finding that the petitioner's rights to due process had been denied by the

special circuit judge's summary decision, i.e. denial of a hearing on aggravating and mitigating factors.

E. Fourth Circuit Court Ruling. Upon remand of this reversal of disbarment, petitioner was again retried by the same specially appointed circuit judge. On this third remand by the Arkansas Supreme Court, the petitioner was again found guilty of violating the cited sections of the Model Rule 8.4(b). The specially appointed circuit judge sentenced the petitioner to a five (5) year suspension from the practice of law (with two years credited, for the time the petitioner had been formally disbarred during this then eight (8) year old disciplinary proceeding), as the appropriate punishment for the petitioner's actions that were complained of by the respondent.[2] The order of this special circuit judge contained scant findings or conclusions on the aggravating and mitigating factors, as mandated by the Arkansas Supreme Court's decision in *Wilson V.* However, the special circuit judge did deny the respondent's asserted claim that the petitioner should be disbarred from the practice of law in the state courts in Arkansas, when the circuit judge found that the facts of the proceeding did not support a disbarment complaint.

The petitioner again appealed this order of suspension to the Arkansas Supreme Court. The petitioner asserted that the special circuit judge could not (as he did) render a punishment

---

2 The petitioner has been "suspended" from the practice of law in the federal courts for the Eastern and Western Districts of Arkansas, since a judge of the Eastern District referred the petitioner to the Arkansas Supreme Court for possible disciplinary proceedings in 1985. Though the petitioner has been "suspended" from the practice of law in the federal courts in Arkansas for more that 15 years, and he will still be suspended from the practice of law in the federal courts in Arkansas for a "net" of another three (3) years, because the chief judge of the Eastern District of Arkansas recently refused to grant the petitioner's formal request for reinstatement to practice law in the federal courts of Arkansas, until this state court "suspension" expires, effectively "suspending" the petitioner from the practice of law in the federal courts in Arkansas for a period of 18 years.

against the petitioner by imposing a five (5) year suspension from the practice of law, when the sanction of "suspension" (that the Arkansas Supreme Court created for the Committee to impose in the Procedures governing attorney disciplinary proceedings in Arkansas) was limited to only one (1) year (and only two (2) years, now, under the terms of the Arkansas Procedures Regulating Professional Conduct of Attorneys at Law (hereinafter "Procedures II") (the latest version of which Procedures had been adopted by the Arkansas Supreme Court in 1998, seven (7) years after this disciplinary proceeding was brought against the petitioner by the respondent).

The petitioner argued in this latest appeal that, for the Arkansas Supreme Court *now* to allow the special circuit judge to impose a sanction of suspension against him, for a period of time that was in excess of the limitations upon suspension that had been set and published by the Arkansas Supreme Court in its own Section 7 of its own Procedures (Appendix 9), was a violation of his federally guaranteed rights of due process and equal protection. The petitioner asserted to the Arkansas Supreme Court that, to allow such punitive action to be taken by the circuit judge would constitute clear error, because the special circuit judge would be exercising unfettered and unlimited discretion in fashioning a sanction against the petitioner, all in violation of the petitioner's constitutional rights to due process and equal protection under the provisions of the 14th Amendment to the United States Constitution. The respondent cross appealed and asked the Arkansas Supreme Court to disbar the petitioner.

On May 11, 2000, the Arkansas Supreme Court rendered a decision in *Wilson VI* that was procedurally unique and unusual. This decision had the ultimate effect of upholding, by default, the decision of the special circuit judge to suspend petitioner's license to practice law for five (5) years. The unusual aspect of this decision was because there was no "majority opinion" rendered by the Arkansas Supreme Court in *Wilson VI*. Instead, of the seven justices of the Arkansas Supreme Court, three justices (basing their opinion on due process grounds) voted to limit the sanction of suspension against the petitioner in this disciplinary proceeding to one (1) year, as the Committee was so limited by the version of the

Arkansas Model Rules of Professional Conduct (that were in effect when this disciplinary proceeding began) in applying the sanction of "suspension" against any attorney who had been found to have violated the provisions of the Model Rules of Professional Conduct. The chief justice and a special appointed justice joined in an opinion that would have granted the respondent's cross appeal for the petitioner's disbarment.[3] The other two justices, i.e. the "swing justices," joined in an opinion that held that the special circuit judge had "unlimited" discretion to fashion a punishment for the petitioner in a disbarment action (when the punishment determined by the circuit judge was less than total disbarment) and that they did not find that the special circuit judge had abused his direction in fashioning the sanction of a five (5) year suspension of the petitioner, based upon the evidentiary record. However, these two justices agreed with the other three justices that "suspension," not "disbarment," was the proper sanction to impose upon the petitioner in this disciplinary proceeding. These two justices also refused to consider addressing the petitioner's claims that his federally based due process rights had been violated.

3. Practical Effect of Disciplinary Proceeding. Thus, after 10 years of contesting and opposing the respondent's continued efforts to disbar him from the practice of law in Arkansas, the petitioner must now endure a suspension and loss of his ability to practice law for a "net" of three additional years (in addition to the two (2) years that he has been barred from practicing law in the Arkansas courts, during the nearly 10 year period that this same disciplinary proceeding has been pending). This "unique" result has occurred in the petitioner's disciplinary proceeding simply because the three justices of the Arkansas Supreme Court, who voted to limit the petitioner's suspension to a period of one (1) year (as the state Supreme Court's published rules so limited its Committee on Professional Conduct in 1990),

---

3. The petitioner respectfully asserts that these two justices' opinion was based upon erroneous facts and evidence (as was later admitted and acknowledged by the chief justice in an amending letter-order written to the Court's reporter of decisions. See, Appendix 2).

could not convince one of the two "swing justices" to join them in their due process and equal protection based opinion.[4]

Petitioner's prayer for relief is that this Court will grant his *petition for a writ of certiorari*, and, after hearing his appeal, that this Court will hold that the Arkansas Supreme Court and the circuit judge, who fashioned the five (5) year suspension sanction imposed upon the petitioner in this disciplinary proceeding, have violated the rights of due process and equal protection accorded the petitioner (and similarly situated attorney/citizens) by the 14th Amendment to the United States Constitution. The petitioner asserts to the members of this court that these state courts cannot (without acting unconstitutionally) arbitrarily, and with unfettered discretion, impose suspension sanctions against attorneys in disciplinary proceedings, when the resulting suspension sanctions imposed under this system or procedure are for longer periods of time than are the time limitations set for the suspension sanctions that the Arkansas Supreme Court has formally adopted and published as the authority and power of the Arkansas Committee on Professional Conduct to impose the sanction of suspension upon such attorneys.

---

4 Although Associate Justice Brown wrote (16 S.W.3d, at 229) that the decision of the special circuit judge was affirmed in *Wilson VI*, because a majority of the justices of the Arkansas Supreme Court were unable to agree on a single ground for reversal on the core issue of the proper sanction, the petitioner respectfully submits that the justice's statement that "the opinions of this court [in this case] have no precedential value" is apparently *not* correct. Within the last few weeks, the Arkansas Supreme Court has acted to increase the length of a 14 month "retroactive" suspension sanction imposed by the presiding circuit against an attorney with a "*Whitewater*" related misdemeanor criminal conviction (oddly enough, a "sanction" imposed by the same special circuit judge who imposed the five (5) year suspension on the petitioner in this disciplinary proceeding) to a "prospective" five (5) year suspension, based primarily upon the Arkansas court's recognition of the sanction imposed by that court, by default, against the petitioner in this proceeding. See, *Neal v. Matthews*, 342 Ark. ___, ___ S.W.3d ___, 2000 WL 1683376 (Ark., November 9, 2000).

REASONS WHY CERTIORARI SHOULD BE GRANTED

1. **The federally guaranteed due process and equal protection rights of the petitioner (and all similarly situated Arkansas attorney/citizens) are being blatantly violated by the exercise of unfettered and unlimited discretion by the judges and justices of the State of Arkansas in imposing sanctions in attorney disciplinary proceedings were the disbarment of the attorney is sought, especially when these judges and justices have ruled that they can ignore the express limitations of time on imposing suspension sanctions in attorney disciplinary proceedings, as set out in the published procedures adopted by the Arkansas Supreme Court.**

A. The Exercise of Absolute Discretion Results in an Unconstitutional Outcome.

1. Unique Evidentiary Record. The evidentiary record established below in the petitioner's disciplinary proceeding in the Arkansas courts is by far the most extensive record ever compiled in any attorney disciplinary proceeding in any state court. Not only have there been six opinions rendered by the Arkansas Supreme Court (over nearly a 10 year period), there have also been a federal district court decision and a federal appellate court decision rendered during the pendency of this one disciplinary proceeding.

In addition, the evidentiary record in this matter factually establishes that there is a total lack of any established standards to be applied by the judges and justices of Arkansas' courts in imposing sanctions in such attorney disciplinary proceedings. The separate opinion in this case by the two "swing justices" of the Arkansas Supreme Court declined to rule upon the petitioner's due process and equal protection arguments (16 S.W.3d, at 235). These two justices also refused to recognize that there was a one

(1) year limitation on the power to impose the suspension sanction in the Arkansas court's Procedures by stating:

> [T]he whole panoply of sanctions is available to a circuit judge and, concomitantly, to this court. And there is no basis for concluding that because the Committee can suspend a lawyer from the practice for up to one year, circuit judges are similarly limited when meting out sanctions in a disbarment action. **Our rules are so clear on this point that there is no valid basis for invoking the canons of statutory construction, as Justice Smith has done.** To do so takes a limitation on the Committee's power and impresses it on the circuit judges in disbarment proceedings, which was never contemplated by our Procedures. In sum, the circuit judge in this case had the authority to suspend Mr. Wilson from the law practice for five years. (Emphasis Added)

Therefore, the petitioner submits that the evidentiary record that has been created in his case is the best illustration of how an attorney/citizen's federal constitutional rights to due process and equal protection can be, and are, violated, because of the exercise of unfettered and unlimited discretion by Arkansas' judges and justices in fashioning sanctions in attorney disciplinary proceedings, especially when these state court judges and justices have held that they are entitled to ignore the specific limitation on the suspension sanction that is contained in Section 7 of the Procedures, which provisions are entitled "sanctions." (See Appendix 9).

These limitations in the Procedures were established and published as guidelines for these type of disciplinary proceedings by the Arkansas Supreme Court. Since attorney disciplinary proceedings are of a quasi-criminal nature (*In the Matter of Ruffalo*, 390 U.S. 544 (1968)), all provisions of the Arkansas Supreme Court's Procedures governing such disciplinary matters must be strictly construed, with the court resolving any ambiguity

in favor of the attorney. *See, In the Matter of Thalheim*, 853 F.2d 383 (5th Cir. 1988).[5]

To insure that the petitioner receives his federally guaranteed rights to due process and equal protection, the Arkansas Supreme Court must be held by this Court to adhere to its own Procedures, since that court's inherent power to discipline attorneys who practice before it does not absolve that court from its obligation to follow its own rules in the exercise of such power. *In the Matter of Thalheim, supra, United States v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir. 1986); and *In the Matter of Abrams*, 521 F. 2d 1094, 1104-05 (3rd Cir. 1975), *cert. denied*, 423 U.S. 1038 (1975).

2. Unique Procedural Record. In this disciplinary proceeding, the petitioner initially secured the dismissal of the respondent's complaint for disbarment (by the initially appointed circuit judge), based upon a statute of limitations defense; which decision was reversed by the Arkansas Supreme Court (*Wilson I*). Petitioner was next found guilty of violating the Arkansas Model Rules of Professional Conduct, and letters of reprimand and warning were issued to the petitioner by an elected circuit judge, which action was reversed by the Arkansas Supreme Court (*Wilson II*). The petitioner was then summarily disbarred (without a hearing) by a third appointed circuit judge, and that summary action was also reversed by the Arkansas Supreme Court (*Wilson V*). Finally, this third appointed circuit judge imposed a sanction on the petitioner in the form of a five (5) year suspension from the practice of law, which punishment was upheld by the Arkansas Supreme Court (only because no agreement could be reached by a majority of four justices as to the correct sanction to apply in this case (*Wilson VI*)).

---

5 This is exactly the interpretative position adopted by the opinion of the three justices of the Arkansas Supreme Court in *Wilson VI* that ruled in the petitioner's favor, though such interpretative positions were supported by state law citations.

Thus, the petitioner submits that the evidentiary and procedural records established in his disciplinary proceeding in the courts of Arkansas, and the wide variety of sanctions attempted to be imposed against him by the judges and justices of those courts in this one proceeding, clearly establishes that the petitioner has suffered a denial of his federally guaranteed rights to due process and to equal protection (all as guaranteed by the 14th Amendment of the U. S. Constitution) because of all of these various sanctions that have been determined in this attorney disciplinary proceeding by the unfettered and unlimited exercise of the discretion of the state court judges and justices presiding in this matter. The abuse of these federally guaranteed constitutional rights arise when unfettered and unlimited discretion of the presiding judge or justices is allowed to be exercised and applied as the *only* hallmark or guidepost for the imposition of sanctions in such disciplinary proceedings.

These violations of the petitioner's federally guaranteed rights to due process and equal protection have been "compounded" when these state court jurists held, *sua sponte*, that they are allowed to ignore the time limitations on such sanctions that have been created and published by the Arkansas Supreme Court, itself, in its Procedures (Appendix 9). It cannot seriously be disputed that a court, having adopted rules and procedures for attorney disciplinary matters, cannot ignore its own rules and procedures in such disciplinary proceedings, even under the "inherent powers" of that court to discipline attorneys appearing before it. *In the Matter of Thalheim*, supra. The petitioner submits that the Arkansas Supreme Court's attempt to distinguish the applicability of this time limitation on the "suspension" sanction, because such "a limitation . . . on circuit court judges in disbarment proceedings. . . was never contemplated by our Procedures." (16 S.W. 3d, at 235), is a holding that is not supported by the record and, alternatively, presents an ambiguity that must be resolved in favor of the petitioner (as the three justices of the Arkansas Supreme Court agreed in their separate opinion, below. This legal reasoning is contra to all of the previously cited federal

constitutional standards that are universally applicable in attorney disciplinary proceedings.[6]

B. Rulings By Arkansas' Courts in Similar Attorney Disciplinary Matters Have Reached Disparate Results.

The petitioner's (and all of the similarly situated attorney/citizens') rights to enjoy the protections of due process and equal protection, under the 14th Amendment of the U. S. Constitution, are continually being violated by the exercise of the

---

6 The Arkansas Supreme Court (16 S.W.3d, at 223) acknowledged, as "mitigating factors" in sanctioning the petitioner, that he has been involved in public service and public interest litigation. The members of this Court should be aware that the petitioner was elected and served as a representative to the Arkansas General Assembly (after his federal criminal prosecution), and that he served as a member of the Arkansas House of Representatives until "term limited" in 1998. Further, the petitioner has been the lead counsel (until this suspension from the practice of law in this case on June 29, 2000) in a state court action brought in 1992 by himself and the other African American sole practitioner attorneys against the State of Arkansas. That "public interest" litigation has resulted in a successful challenge to the unconstitutionality of the public school funding formula created by the State of Arkansas. See, *Tucker v. Lake View School District No. 25,* 323 Ark. 693, 917 S.W.2d 530 (Ark. 1996) and *Lake View School District No. 25 v. Huckabee,* 340 Ark. 481, 10 S.W.3d 892 (Ark. 2000), which action is still ongoing at this time, in a "compliance trial" ordered by the Arkansas Supreme Court. Unlike similar "state and public school funding challenges" in Kentucky (*Rose v. Council for Better Education,* 790 S.W.2d 186 (Ky. 1989)) and Ohio (*DeRolph v. State,* 728 N.E.2d 993 (Ohio 2000)), where large groups of school districts joined together to challenge their respective state's public school funding formulas, the petitioner and his co-counsel have been the only attorneys representing the Plaintiffs (a 200 student school district against the State of Arkansas) in this class action and they have successfully carried the *Lake View School District* litigation for a period of nearly 10 years (parallel to the time that the Petitioner's disciplinary proceeding has been pending), without receiving any payment of attorneys' fees or reimbursement of litigating costs, though these attorneys right to such fees and costs has now been established by order of the Arkansas Supreme Court.

unfettered and unlimited discretion of the judges and justices of the Arkansas court system in attorney disciplinary proceedings. These constitutional violations are clearly established in the evidentiary record established below in the petitioner's disciplinary proceeding in the courts below, especially when compared to the sanctions imposed by the Arkansas judiciary in the recently reported decision of the Arkansas Supreme Court in the case of *Neal v. Matthews*, 342 Ark.____, ___ S.W.3d ___, 2000 WL 1683376 (Ark. 2000). Further, these constitutional violations are illustrated by a comparison of the Arkansas Supreme Court's disparate handling of similarly situated attorneys in the cases of *In the Matter of Meurer*, 337 Ark. 608, 990 S.W.2d 552; 338 S.W.2d 373, 993 S.W.2d 917; 338 Ark. 601, 999 S.W.2d 196 (Ark.1999), a case involving a Caucasian attorney, and *Neal v. Hollingsworth*, 338 Ark. 251, 992 S.W.2d 771(Ark.1999), a case involving an African American attorney.

The petitioner submits that the resulting sanctions and punishments administered and imposed by the Arkansas courts in these four attorney disciplinary proceedings, all through the exercise of the unlimited and unfettered discretion of the judges and justices of the courts of Arkansas, are so disparate that they are, per se, clear evidence that the system created by the Arkansas Supreme Court for the disciplining of attorneys results in violations of the federal guaranteed due process and equal protection rights of the petitioner and the other similarly situated attorney/citizens that have been the subjects of these disciplinary proceedings.

1. A Comparison of the *Wilson* and *Matthews* Proceedings. A simple comparison of the Arkansas courts' handling of the petitioner's disciplinary proceeding and the disciplinary proceeding of Charles D. Matthews establishes that the exercise of unfettered and unlimited discretion by circuit court judges in Arkansas in disbarment proceedings has resulted in constitutional violations of these attorneys' rights to enjoy the federally guaranteed protections afforded to all citizens by the due process and equal protection clauses of the 14th Amendment.

Circuit Judge John Plegge was the state court judge that initially meted out punishment and sanctions in *both* the *Wilson*

and *Matthews* cases. In the case of the petitioner (an African American attorney), where there had been the entry of a plea by the petitioner to a federal criminal misdemeanor charge (which criminal charge did not involve the petitioner's law practice), the petitioner was, initially, summarily disbarred by this circuit judge, without a hearing. When that decision was overturned by the Arkansas Supreme Court's reversal of the circuit judge's action (*Wilson V*), the petitioner was then given a sanction in the form of a five (5) year suspension from the practice of law, after a hearing, even though the circuit judge failed to memorialize what consideration he had given to the aggravating and mitigating circumstances, as so directed to do by the Arkansas Supreme Court.

In the *Matthews* disciplinary proceeding, the attorney (a Caucasian attorney who was known to Judge Plegge) had pled guilty to a similar federal criminal misdemeanor charge (which criminal charge had actually involved the attorney's legal practice). Judge Plegge, in the exercise of his unlimited discretion in attorney disciplinary matters, imposed a sanction against Mr. Matthews in the form of a 14 month suspension from the practice of law, which suspension Judge Plegge made "retroactive," so that it ran concurrently with this attorney's period of incarceration in the federal prison. Judge Plegge's decision in Mr. Matthew's case was appealed by the respondent, as the representative of the Committee, and this circuit judge's actions were only very recently reversed by the Arkansas Supreme Court. The punishment imposed upon Mr. Matthews, in the form of the 14 month suspension sanction, was increased by the Arkansas Supreme Court to a five (5) year suspension sanction, with this suspension to be served "prospectively," from the time of the entry of the Arkansas Supreme Court's decision.[7]

7

7 Though, at first blush, it would appear that the Arkansas Supreme Court was trying to balance and equalize the punishments meted out for both Charles Matthews and the petitioner (and Associate Justice Corbin so noted that factor in his opinion in the *Matthews* case) it seems strange to the petitioner that the Arkansas Supreme Court would adopt such a ruling in *Matthews*, when that court announced in *Wilson VI* that "the

2. A Comparison of the *Meurer* and *Hollingsworth* Proceedings. The petitioner submits that an even more egregious example of the clear violation of all attorney/citizens' federally guaranteed rights to due process and equal protection, by the Arkansas Supreme Court in state court disciplinary proceedings, is illustrated by the dissimilar decisions rendered by the Committee and the Arkansas Supreme Court in these *Meurer* and *Hollingsworth* cases.

In *Meurer,* the attorney was not charged with a criminal offense, but a complaint was filed with the Committee by a client that the attorney had taken money from her. The Committee, after a hearing, imposed a sanction in the form of a letter of reprimand and required Mr. Meurer to make restitution to the client in the amount of $18,000 at the rate of $300 per month. The attorney immediately defaulted on this obligation, he was held in contempt by the Arkansas Supreme Court and he was found to have knowingly lied to the Court in affidavits filed in his defense. Mr. Meurer was remanded to the Committee for further sanctions and suspended from the practice of law, until the Committee acted. The Committee, in the fall of 1999, imposed two sanctions in the form of separate suspensions of Mr. Meurer's license to practice law for periods of one (1) and two (2) years, respectively. The Committee and the respondent did not vote to institute disbarment proceedings against this attorney. Mr. Meurer was allowed to voluntarily surrender his license to practice law on June 22, 2000.

In *Hollingsworth*, the attorney was not charged with a criminal offense, but a complaint was filed with the Committee by a client that the attorney had taken money from her. The Committee, after a hearing, voted to institute a disbarment

---

opinions of this court [in *Wilson VI*] have no precedential value" (16 S.W.3d, at 229). Therefore, the petitioner submits to this Court that any attempt by the Arkansas Supreme Court to try to achieve parity, between its decisions in *Wilson VI* and *Matthews*, do not cure the federal constitutional violations that are basically inherent in a system that allows the circuit court judges of Arkansas to exercise their unlimited discretion, without any limitation, in determining a proper sanction to impose in any attorney disciplinary proceeding brought before these circuit judges.

proceeding against Mr. Hollingsworth, even though he had made restitution of the funds to the client. Mr. Hollingsworth, who, years before, had been appointed to serve out the unexpired term of a retiring justice of the Arkansas Supreme Court, was found guilty by the circuit judge and a sanction was imposed in the form of a six (6) month suspension from the practice of law. The respondent, who was also the prosecuting party in the *Hollingsworth* case, appealed that suspension order to the Arkansas Supreme Court. There, the Arkansas Supreme Court reversed the circuit judge and disbarred Mr. Hollingsworth.

The petitioner submits to the members of this Court that the system of attorney discipline created by the Arkansas Supreme Court, in its Model Rules and its Procedures:

> (1) where the judges and justices of the Arkansas courts are empowered to exercise their unfettered and unlimited discretion on an *ad hoc* basis in the determination of sanctions to be imposed as punishment upon the attorneys brought before the Arkansas courts;
>
> (2) where these same judges and justices have decided that they are allowed or empowered to ignore the limitations created by the Arkansas Supreme Court in its Procedures for the imposition of the suspension sanction; and
>
> (3) where the sanctions that are actually rendered and the punishments actually imposed (under such system in these disciplinary proceedings) are so divergent and disparate (when the attorneys, who are the subjects of such disciplinary proceedings, are in similarly situated positions),

is a "system" that (at least in its actual implementation) has resulted in the blatant denial of the federally guaranteed rights of due process and equal protection to the petitioner and any other similarly situated attorney/citizen to enjoy these rights that are

ensured by the provisions of the 14th Amendment to the United States Constitution.

The evidentiary record compiled in the Petitioner's nearly 10 year struggle to maintain his license to practice law in Arkansas will afford this Court an excellent vehicle to use in reviewing and rendering a decision on these important questions of constitutional application. An opinion by this Court would give much needed guidance, not only to the attorneys and courts of the State of Arkansas, but to all state courts considering these important constitutional matters regarding the federally guaranteed rights to due process and equal protection in the setting of attorney disciplinary proceedings.

C. The Comity Usually Accorded by This Court to State Court Attorney Disciplinary Proceedings is Not be a Bar to The Court's Need to Review the Judgment Involved Here.

The petitioner recognizes that this Court has generally declined to sit in judgment of state court disciplinary actions, *Thread v. United States*, 354 U.S. 278, 281 (1957), but there are exceptions to the degree of comity this Court accords such state court proceedings. See, *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957) and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The petitioner asserts that the denial of his federally guaranteed rights to due process and equal protection in this disciplinary proceeding warrants, nay demands, that this Court review of the "unique" judgment of the Arkansas Supreme Court in *Wilson VI*.

The petitioner submits that startling aberrations in Arkansas substantive and procedural body of law have occurred as a result of the petitioner's defense against the disciplinary charges lodged against him by the respondent and the Committee in this cause. The most dramatic result of the petitioner's broad ranging defense in this cause has been the "comprehensive" 1998 changes that the Arkansas Supreme Court made in the Arkansas Procedures Regulating Professional Conduct of Attorneys At Law (hereinafter referred to as "Procedures II") which changes were adopted on January 8, 1998. Under previous provisions of Section 7.A.(3) of

the 1990 Procedures (which provisions were, and are, applicable to the prosecution of the petitioner by the Committee), the sanction of the suspension of an attorney's license to practice law was clearly limited to one (1) year. However, under provisions of Section 7.E.(2) of the "new" 1998 Procedures II, the suspension of a lawyer's privilege to practice law can be fixed for a period of time not in excess of two years. Evidence of the petitioner's impact on these changes to the Arkansas Procedures by the Arkansas Supreme Court can be verified by simply noting the comments and case citations that appear in the annotations under each section of these newly promulgated Procedures II.

In addition to these dynamic changes in the Arkansas Procedures applicable in attorney disciplinary proceedings, this 10 year prosecution by the respondent against the petitioner has spawned a series of judicial decisions that are most novel. For example: there was a determination by the Arkansas Supreme Court that no statute of limitations applied to attorney disciplinary proceedings (*Wilson I*). That court also held that duly elected judges within the jurisdiction where the complaint was filed (if African American) do not assume the same judicial authority to hear cases and causes authorized by Article 7 of the Arkansas Constitution and, further, that the Arkansas Supreme Court, under the authority of Amendment 24 of the state constitution, has the right to displace duly elected judges from sitting as magistrates and to appoint a special judge, even where has been no recusal of the duly elected circuit judge (*Wilson II*). The Arkansas Supreme Court held that the ruling of a *de facto* judge did not activate the doctrines of res judicata, collateral estoppel, or double jeopardy in any subsequent prosecution of the same party (*Wilson II*). This court has also held that the Arkansas courts have the independent and sovereign authority to ignore this Court's finding in *In the Matter of Ruffalo*, 390 U.S. 554, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (*Wilson V*).

The Arkansas Supreme Court and its inferior courts have held that they can ignore and disregard the applicability of the rules of strict construction that must be applied to the *quasi-criminal* proceeding involving attorney disciplinary actions (*Wilson IV* and *Wilson V*). Although the applicable provisions of the Arkansas

Model Rules mandate that all persons cited for alleged violations of Rule 8.4(b) be referred to the circuit courts for disbarment proceedings, this mandated referral is now the subject of "discretionary action" by the Arkansas courts, even though in the instant cause it was declared that there was no discretion as to whether or not to refer the petitioner for disbarment.

The State of Arkansas has further determined that all persons charged with Model Rule 8.4(b) violations do not face the same requirement of being charged nor, if they are charged, do they face the same possibility of sanction, even if found guilty. Those attorneys who are charged and who are sanctioned are not limited by the same degree of sanctions available under Section 7 of the Procedures, but, instead, such attorneys are subject to unlimited discretionary punishment by the courts of Arkansas. The procedural rules, as designated in Section 5 of the Procedures, have now been determined, *expo post facto,* to be "sanction" rules enabling the resulting harsh punishment imposed against the petitioner in this case. Finally, the petitioner submits that, if the federally guaranteed rights of the petitioner to enjoy the equal protection of the laws and to secure due process interfere with the aims of punishment by those in control of the Arkansas attorney disciplinary system, then such requirements apparently can be completely disregarded by the state courts in the unfettered and unlimited exercise of these state court judges in determining an appropriate sanction for the attorney in question. This Court must not allow these results to stand or to continue. *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967); *Ex Parte Garland*, 71 U.S. (4 Walls) 333, 18 L.Ed. 366 (1860). *Matthews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1876).

One of the most egregious examples of the violation of the petitioner's federally guaranteed rights to due process and equal protection in this disciplinary proceeding is represented by the holding of Associate Justice Brown that the Arkansas Supreme Court can effectively ignore the limitation the court itself placed on the sanction of suspensions in its own Procedures. This refusal of the Arkansas Court to follow its own rules is apparently for the purpose of obtaining a conviction of the petitioner on the issues in controversy in this disciplinary proceeding. As noted above, such

determinations clearly violate the federal constitutional standards required for these proceedings. See, *In Re Matter of Thalheim*, 853 F.2d 383, supra. Petitioner was entitled to procedural due process which not only includes notice, but an effective opportunity to be heard in the disbarment or suspension proceeding. Since the petitioner was incarcerated at the time of the Committee's initial hearing in this matter, (petitioner would have been released from prison in less than 45 days), petitioner's constitutionally guaranteed right to be heard in his *quasi-criminal* disbarment or suspension proceeding was violated. See, *In Re Ruffalo*, 390 U.S. 554, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); *Ex Parte Bradley*, 74 U.S. (7 Walls) 364, 19 L.Ed. 214 (1868); *Chambers v. Nasco*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Standing Comm. On Discipline v. Ross*, 735 F.2d 1168 (9th Cir.) cert. denied 469 U.S. 1081, 105 S.Ct. 583, 83 L.Ed.2d. 692 (1984).

The petitioner submits to the members of this Court that the evidentiary record established in this case calls out for, and provides this Court with reason to, review the final judgment of the Arkansas Supreme Court in the petitioner's disciplinary proceeding. Such action should be taken by this Court, notwithstanding the Court's usual practice of extending comity to state courts in their own disciplinary matters, because of the egregious nature of the injuries that have been inflicted by the respondent and the Arkansas courts upon the petitioner and his federally guaranteed rights to due process and equal protection.

D. This Court Must Review the Petitioner's Federal Constitutional Claims, Because the Arkansas Court Has Refused to Do So.

The Arkansas Supreme Court's failure to reach a consensus in this cause (in the form of a majority decision by the members of that court) represents a first in the annals of Arkansas jurisprudence, as far as the petitioner can ascertain. The lack of a definitive decision by the Arkansas Supreme Court is understandable, however, in view of the unwieldy process utilized and the variety of sanctions imposed against the petitioner in four separate trial court hearings in this one proceeding. The final decisions of the circuit court and the Arkansas Supreme Court,

below, declined to consider or rule upon the federal constitutional defenses asserted by the petitioner. The opinion of the two "swing justices" of the Arkansas Supreme Court declined to address the constitutional arguments of the petitioner, since these two justices stated (16 S.W.2d at 235):

> [O]ur Procedures clearly give circuit judges full authority to suspend as the evidence warrants in disbarment matters. This court has found a violation of an attorney's due process rights when that attorney was not notified of a specific rule violation for which he or she might have been sanctioned. See, e.g., Colvin v. Committee on Professional Conduct, 305 Ark. 239, 806 S.W.2d 385 (1991). Here, though, Mr. Wilson was fully apprised of the fact that his sanction might be disbarment. Under these facts it makes little sense to contend that the assessment of a lesser sanction which is authorized by our Procedures violated his right to due process.

Chief Judge Franklin Waters, of the Western District of Arkansas, in his decision (in the federal court "removal action") remanding this cause for trial in the Arkansas state courts in *Neal v. Wilson*, 920 F.Supp 976 (E.D. Ark. 1996), was of the opinion that these federal constitutional issues would be addressed at the state level, and that remand was, therefore, required. The disregard of these federal constitutional defenses presented by the petitioner by, at least, four of the Arkansas Supreme Court Justices in *Wilson VI*, has resulted, at least for the present, the "practical" disbarment of the petitioner in this proceeding.

These state courts have continued to ignore the federal due process and equal protection issues raised by the petitioner regarding double jeopardy, estoppel, laches, and the statute of limitation (*Wilson II*). Though three of the justices addressed the issues applicable to the standard of statutory construction applicable to the disciplinary rules in the regulation of attorneys, these justices did so on a state law basis, ***not on the federal due process and equal protection grounds*** raised by the petitioner for

nearly 10 years. Specifically, four of the justices of the Arkansas court (in *Wilson VI*) totally ignored the strict construction requirement of *In the Matter of Ruffalo* and *In the Matter of Thalheim*, supra.. The Arkansas court also ignored the prohibition, on due process grounds, that prohibits an appeal by the State of an unfavorable decision in a criminal or *quasi-criminal* proceeding. Since this is a *quasi-criminal* matter, allowing the State of Arkansas to have the right to appeal either a favorable or adverse decision of the circuit court violates all types of due process and double jeopardy protections of the petitioner. Other than under the terms of the Procedures of the Arkansas Supreme Court in these disciplinary proceedings, a prevailing party cannot appeal. See *Bynum v. Savage*, 312 Ark. 137, 847 S.W.2d 705 (Ark. 1993).

This Court found in a case from Arkansas, in *Cole v. Arkansas*, 333 U.S. 196 (1948), that the mere opportunity to present constitutional arguments, without a real chance of having those arguments considered, does not constitute an opportunity to be heard, which right is guaranteed by the due process clause of the 14th Amendment to the U. S. Constitution. A review by the members of this Court of the holdings below by the Arkansas state courts on each of the petitioner's causes will reveal that there is a total void in the area of *a holding* by the Arkansas courts relative to the protections afforded to the petitioner by the federally guaranteed rights of due process and equal protection. This *nonaction* by the Arkansas courts constitutes the ultimate perversion of due process, as such federally guaranteed rights apply to the petitioner in this attorney disciplinary proceeding.

E. The Rules of Construction for State Court Disciplinary Rules and Procedures Must be Governed by Federal Constitutional Standards.

It has been contended during the course of this disciplinary process that the petitioner, because he is an African-American, an activist in his community, and an advocate of civil rights and civil liberties for African-Americans and the poor, is, in fact, being subjected to sanctions in this disciplinary proceeding because of his racial identity and his political views. Without there being a denial or affirmance by the courts of Arkansas of the constitutional

protections asserted by the petitioner herein, the context of petitioner's arguments readily avail themselves to the point that the Procedures of the Arkansas Supreme Court in question are over-broad and also stand in violation of the rights guaranteed to the petitioner by the provisions of the First Amendment to the United States Constitution. Without there being a system for attorney discipline that has structure, limitation or restriction on sanctions, an attorney in Arkansas is subject to a very broad array of different sanctions and the application of the Procedures by the state's courts in a manner that defies reality. See *Broderick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Without there being the necessary structure and limitations for the system of attorney discipline adopted by the Arkansas Supreme Court, and without a reference by the presiding judge in this contested attorney disciplinary proceeding to the ABA's Model Standards for Imposing Lawyer Sanctions (Sections 9.22 and 9.32), there is now way for the petitioner or any other of Arkansas' practicing attorneys to be able to tell what aggravating and mitigating circumstances served as a basis for the circuit court's determination in this disciplinary proceeding that cause the circuit judge to finally determine that a five (5) year period was an appropriate suspension sanction for the petitioner, as opposed to 15 or even 50 years. With *only* the exercise of the unlimited discretion of the circuit judge to rely upon, arbitrarily unfair (i.e. unconstitutional) results are bound to occur in these attorney disciplinary proceedings..

The salient language of the fifth circuit court of appeals in the *In Re Matter of Thalheim*, 853 F.2d, at 390, supra, echos again in the instant cause, as we quote:

> When a court undertakes the sanction of an attorney for violating court rules, it is encumbered among sanctioning the court to observe scrupulously its own rules of disciplinary proceedings. If the rules are inadequate, the court can proceed to amend them. But unless and until such an amendment of rules occur, attorneys have a right to rely on the rules. A court cannot ignore

and circumvent its own rules at will to detriment of those covered by them.

In the present cause, it is the contention of the petitioner that Section 7 of the Arkansas Procedures limited the suspension of the petitioner to one (1) year. In view of the fact that petitioner had already been separated from the practice of law (by a prior erroneous decision of the presently presiding circuit court judge) for about 18 months, at the time of the subsequent finding, on remand, that he should be suspended for five (5) years, the petitioner respectfully submits that he has already served a suspension from the practice of law in Arkansas that exceeds the periods of time for a suspension sanction, as expressly set forth in the applicable Arkansas Procedures (Appendix 9) adopted by the Arkansas Supreme Court, itself.

The Arkansas Supreme Court, being a thoroughly divided panel below in *Wilson VI*, let stand the five (5) year suspension sanction determined by the specially appointed judge of the circuit court. Thus, by pure default, the Arkansas Supreme Court adopted the ruling of the circuit court on the "sanction" issue. The determination on the five (5) year suspension sanction was made on by the circuit court, in the first place, through the exercise of that state court judge's unfettered and unbridled discretion. The Arkansas Supreme Court has now held that such a holding is permissible, under the provisions of Rule 5.G(2) of the Procedures, irrespective of the limitations on the length of such sanction as appears in Section 7.A(3) of the Procedures. This holding by the state court should be overturned by this Court because a *quasi-criminal* proceeding is subject to the same due process limitations and protections, as are the restraints on state courts in purely criminal proceedings. *In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed2d 527 (1967); *Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981).

The State of Arkansas argues that, since the petitioner was charged with a Rule 8.4(b) violation and "could have been" disbarred, infinitum, that any less sanction that was imposed (that was less than disbarment) therefore comes within the constitutional approval of the 14th Amendment. Petitioner maintains that this is

an specious argument. Taking this argument to its illogical conclusion, the State is saying it has literally the power of "professional" life or death of all attorneys who come within its system, and, regardless of the degree of culpability or the degree of guilt, that the imposition of any sanction by the circuit courts of Arkansas in an attorney disciplinary proceeding that is less than the professional "death penalty" of disbarment, that such determination comes within a "safe harbor" of constitutional compliance, as for as the due process and equal protections provisions of the 14th Amendment are concerned. The petitioner respectfully rejects such legal reasoning and urges the members of this Court to do the same.

The Arkansas Supreme Court must be required by the order of this Court to construe its Model Rules and Procedures on attorney disciplinary matters in the same constitutional manner applicable to the construction of legislative enactments. The Arkansas Supreme Court's power to adopt procedural rules is the equivalent of the Arkansas General Assembly's power to enact legislation. *See, Supreme Court of Virginia v. Consumers Union, Inc.* 446 U.S. 719 (1980). Therefore, as held by the fifth circuit in *In the Matter of Thalheim*, supra, it is clear that attorney disciplinary proceedings, especially those relating to disbarment and suspension cases, "are quasi-criminal in character and the same type of federal constitutional standards are applicable. Accordingly, the petitioner submits that that state court's disciplinary rules must be read strictly, resolving any ambiguity in favor of the attorney.

In summation, the Petitioner submits to the members of this Court that the most egregious violation of the federally guaranteed rights of due process and equal protection (that is inherent in the system established by the Arkansas Supreme Court for attorney discipline) is the allowance by that court (in *Wilson VI*) of the unlimited and unfettered exercise of discretion by the judges and justices of the Arkansas courts in determining appropriate sanctions in attorney disciplinary matters. This very permissive holding by the Arkansas Supreme Court will allow such exercise of discretion by the circuit court judges of the state to have the very real opportunity to run rampant, uncontrolled and,

therefore, to result in the determinations of sanctions that will be in violation of the federal standards required by the due process and equal protection provisions of the 14th Amendment. This case presents a situation that cries out for the intervention of this Court, under the rationale of its must recent ruling in *City of Chicago v. Morales,* 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); as well as the Courts earlier decisions in *E. G. Cox v. Louisiana*, 379 U.S. 536 (1995); *Strickner Poultry Corp. v. U.S.*, 295 U.S. 495 (1935); *Smiley v. Kansas*, 196 U.S. 447, 455, 25 S.Ct. 289, 49 L.Ed. 546 (1905); *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

CONCLUSION

The system of rules and regulations formally adopted by the Arkansas Supreme Court, in its Model Rules and Procedures for the disciplining of attorneys, is no less important to our system of justice than fair and consistent administration of the criminal justice system. Under the United States Constitution, no person would be allowed to be sentenced by a criminal court judge to a term in prison that would be in excess of the defined limits set out for the offense in a statute. Neither should an attorney be allowed to be sentenced to a sanction that is beyond the penalty set out in a specific rule adopted by the Arkansas Supreme Court for the implementation of this disciplinary process. There is an extraordinary voluminous evidentiary and pleading record that has been established in this attorney disciplinary proceeding, over the last 10 years, in the courts below. Therefore, the petitioner submits that his *petition a writ of certiorari* in this case presents this Court an extraordinary opportunity to review an expansive and well developed record and then render a landmark decision on the constitutional questions presented here, regarding the disciplining of attorneys in the several states by the courts of those states..

The petitioner asks the members of this Court to note that President William Jefferson "Bill" Clinton has been charged with violating the same provisions of this same Model Rule 8.4(b), and that President Clinton is now the subject of a complaint for disbarment filed by this same respondent, under this same attorney disciplinary system created by the Arkansas Supreme Court, which

system has treated the petitioner so unfairly and unconstitutionally. As this Court has aptly stated in previous cases regarding the President, and we paraphrase, *no one is above the law, including the President.* This Court can now say, by reviewing this case, that no one is below the law, including the petitioner and the President. See, *Resolution Trust Corporation v. Bright*, 6 F.3d 336 (5th Cir. 1993). The right of practicing attorneys to enjoy the federally guaranteed rights of due process and equal protection should not be considered by this Court to be any less than these same federal constitutional rights that this Court has held, many times before, apply to these attorneys' clients in similar factual settings.

Leaving the range of punishments and sanctions for attorneys in disciplinary proceedings solely to the unbridled discretion of the circuit judges or the justices of the Arkansas state court system could (and the petitioner asserts has) lead to the result where an attorney in West Memphis, Arkansas can receive a letter of reprimand or six months suspension for an action in violation of the Model Rules, and where an attorney in Fort Smith, Arkansas can be disbarred for the exact same conduct. This is because there are now no precise standards that exists in the Procedures that are part of the system of attorney discipline created by the Arkansas Supreme Court.

Petitioner, therefore, urges the members of this Court that the *petition for a writ of certiorari* be granted by this Court and that the Court take this opportunity to render an opinion that delineates the applicability of the federal due process and equal protection protections to the compelling facts presented in this unique attorney discipline proceeding that has been brought against the petitioner.

Respectfully submitted,

DARRELL F. BROWN #72102
807 West Third Street
Little Rock, Arkansas 72201-0249
(501) 376-1845

TABLE OF CONTENTS

APPENDICES

J.L. WILSON v. JAMES A. NEAL

APPENDIX 1 ..... App. 1

APPENDIX 2 ..... App. 20

APPENDIX 3 ..... App. 22

APPENDIX 4 ..... App. 24

APPENDIX 5 ..... App. 38

APPENDIX 6 ..... App. 53

APPENDIX 7 ..... App. 54

APPENDIX 8 ..... App. 56

APPENDIX 9 ..... App. 70

APPENDIX 1

WILSON V. NEAL
16 S.W.3d 228, 341 Ark. 282 (Ark. 2000)

Supreme Court of Arkansas.

Jimmie L. WILSON
v.
James A. NEAL.
No. 99-103.
May 11, 2000.

COUNSEL

George Hairston, New York, NY; Roy C. Lewellen, Marianna; and Wilson & Valley, by: E. Dion Wilson, Helena, for appellant.

Robert J. Donovan, Marianna, for appellee.

OPINION

LEAD
ROBERT L. BROWN, Justice.

This case involves the discipline of an attorney, appellant Jimmie L. Wilson, where a majority of justices has been unable to agree on a single ground for reversal on the core issue of the proper sanction. Thus, the decision of the circuit judge is affirmed, and the opinions of this court have no precedential value.

The circuit judge determined that Mr. Wilson should be suspended from the practice of law for five years with credit given for the time he was previously disbarred from practice by this court. Two issues have been raised by Mr. Wilson in his appeal: (1) the circuit judge erred in failing to recuse in this matter; and (2) the five-year suspension ordered by the circuit judge exceeded

the permissible sanction under our rules. Appellee James A. Neal as executive director of the Supreme Court Committee on Professional Conduct has cross-appealed on the basis that disbarment is the appropriate sanction. On two of the three issues, a majority of the court agrees. All seven justices agree that the circuit judge's decision not to recuse was not an abuse of discretion. Justice Brown, Justice Imber, Justice Thornton, Justice Smith, and Special Justice Burnett agree that the circuit judge's denial of disbarment should be affirmed.

As already stated, a majority of the court does not agree on the appropriate sanction for Mr. Wilson. Justice Thornton, Justice Smith, and Special Justice Burnett conclude that the circuit judge was limited to a one-year suspension under the Procedures then in effect with credit given for the period when Mr. Wilson was precluded from practicing law. Justice Brown and Justice Imber agree with the circuit judge that a five-year suspension is appropriate with credit given for the period when Mr. Wilson was precluded from practicing law. Chief Justice Arnold and Special Justice Shell conclude that disbarment is the appropriate sanction. Because a majority does not agree to reverse or modify the sanction imposed by the circuit judge, his decision is affirmed.

The opinion by Justice Brown affirming the circuit judge on all three issues is presented first followed by the opinion of Justice Smith in favor of a one-year suspension and the opinion of Chief Justice Arnold in favor of disbarment.

The conduct of Mr. Wilson at issue occurred almost twenty years ago. Disbarment proceedings have been ongoing for ten years. This is the fifth appeal we have had in the case. See Wilson v. Neal, 332 Ark. 148, 964 S.W.2d 199 (1998) (Wilson IV); Wilson v. Neal, 329 Ark. 125, 947 S.W.2d 338 (1997) (Wilson III) (per curiam); Neal v. Wilson, 321 Ark. 70, 900 S.W.2d 177 (1995) (Wilson II) (per curiam); Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994) (Wilson I); see also Neal v. Wilson, 112 F.3d 351 (8 th Cir.1997) [**285] and Neal v. Wilson, 920 F.Supp. 976 (E.D. Ark.1996). In Wilson I, we reversed the circuit judge who had found that Mr. Wilson's disbarment was barred by the

statute of limitations, and we remanded for further proceedings. In Wilson II, we granted a writ of certiorari and held that then circuit judge Olly Neal lacked the authority to sanction Mr. Wilson because a special circuit judge had been assigned to hear the case. In Wilson III, we denied Mr. Wilson's mandamus petition to include the federal record as part of his disbarment appeal. In Wilson IV, we reversed the disbarment order of the circuit judge and remanded the matter to that judge for him to consider the aggravating and mitigating standards of the American Bar Association in deciding the appropriate sanction.

The genesis of this matter was a disbarment complaint filed by the Arkansas Committee on Professional Conduct ("Committee") on October 9, 1991, after Mr. Wilson pled guilty to five misdemeanor offenses in federal district court as a result of a plea bargain with the United States Attorney. The criminal conduct involved had occurred ten years earlier in 1981 and 1982. The guilty pleas took place on August 22, 1990. Mr. Wilson pled guilty to three counts of violating 18 U.S.C. § 658 by "knowingly" disposing of soybeans and rice that were mortgaged and pledged to the FmHA, and two counts of violating 18 U.S.C. § 641 by "knowingly" taking money from a Department of Agriculture bank account and using it for unapproved purposes. (FN1) In 1985, the United States District Court suspended his license to practice law in the federal courts pending final resolution of any disciplinary action against him by the Committee and by this court. As a result of his guilty pleas, he served four and one-half months in federal prison.

This court affirmed the fact that Mr. Wilson violated Rule 8.4(b) of the Model Rules of Professional Conduct in Wilson IV. There, we held:

Although all five crimes were misdemeanors, we agree with the trial court that these convictions involved dishonesty and a breach of trust, and seriously undermined "the confidence of the public in our legal profession." See In Re Lee, 305 Ark. 196, 806 S.W.2d 382 (1991). Because we have no hesitation in holding that Wilson's convictions reflected adversely on Wilson's fitness to

practice law, we affirm the trial court's finding that Wilson violated Model Rule 8.4(b).

332 Ark. at 161, 964 S.W.2d at 205-206. However, with regard to the appropriate sanction we concluded that the circuit judge had erred in finding that a violation of Model Rule 8.4(b) automatically required disbarment. We directed the circuit judge to evaluate and weigh certain aggravating and mitigating standards adopted by the American Bar Association in deciding the proper sanction. On remand, the circuit judge ordered that Mr. Wilson be suspended from the practice of law for five years, but he made no findings on specific aggravators and mitigators. This five-year suspension is the sanction before us in this appeal, as is the Committee's cross-appeal for disbarment.

I. Recusal

The pleadings filed subsequent to remand included a motion by Mr. Wilson to the circuit judge requesting that the judge recuse because of bias. He asserts that in the proceedings prior to the last appeal, the circuit judge showed that he had no intention of adjudicating sanctions, and that he was committed to disbarment. Mr. Wilson asserts that the judge's promise of a sanction hearing in the proceedings prior to his last appeal, and his failure to provide one in the prior proceedings, showed a predisposition to refuse to adjudicate sanctions, and that the judge's additional conclusion in his decision in the prior proceedings that the undisputed facts dictated disbarment, showed that the judge intended to disbar Mr. Wilson regardless of law or fact.

Mr. Wilson also argues that comments by the circuit judge in his decision on the motion to recuse, and in his discussion on the motion for reconsideration, further show that the judge's prejudice remained unchanged and that a severe sanction was certain. He asserts that the order denying the recusal motion exhibits overt bias when the judge stated he took "umbrage" at the suggestion Mr. Wilson had been deprived of earning a living for two years. Mr. Wilson also cites as error a discussion between the judge and counsel on the day of the sanction hearing, when the motion for

reconsideration was discussed. In response, the judge stated the word "umbrage" was intended to convey his disappointment at the allegation that Mr. Wilson had been deprived of making a living by the judge rather than as a personal insult.

There is a presumption of impartiality on the part of judges. Black v. Van Steenwyk, 333 Ark. 629, 970 S.W.2d 280 (1998). Moreover, the decision to recuse is within the trial court's discretion and will not be reversed absent abuse. Trimble v. State, 336 Ark. 437, 986 S.W.2d 392 (1999). The question of bias is usually confined to the conscience of the judge. Black v. Van Steenwyk, supra; Dolphin v. Wilson, 328 Ark. 1, 942 S.W.2d 815 (1997). An abuse of discretion can be shown by proving bias or prejudice. Massongill v. County of Scott, 337 Ark. 281, 991 S.W.2d 105 (1999); Trimble v. State, supra. To decide whether there was an abuse of discretion, we review the record to see if any prejudice or bias was exhibited. Black v. Van Steenwyk, supra; Dolphin v. Wilson, supra. There is a duty not to recuse where no prejudice exists. Massongill v. County of Scott, supra; U.S. Term Limits, Inc. v. Hill, 315 Ark. 685, 870 S.W.2d 383 (1994); Carton v. Missouri Pac. R.R., 315 Ark. 5, 865 S.W.2d 635 (1993). The party seeking disqualification bears the burden of proving bias or prejudice. Trimble v. State, supra; Dolphin v. Wilson, supra; Noland v. Noland, 326 Ark. 617, 932 S.W.2d 341 (1996).

In the instant case, following remand the circuit judge appeared to hear the evidence presented in an impartial manner giving each side full opportunity to address the issues. The judge acknowledged that Mr. Wilson was an officer of the court and spoke positively of his achievements. While the judge's use of the word "umbrage" in its written order denying recusal may not have been the best choice of words, it in no wise was prejudicial or exhibited bias. Moreover, Mr. Wilson cites no example of bias at the hearing, and thus he demonstrates no prejudice. In the absence of a showing of prejudice, we hold that the circuit judge did not abuse his discretion in declining to recuse.

II. The Sanction

As already noted, Mr. Wilson violated Rule 8.4(b), which is the commission of a "criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." His conduct constitutes serious misconduct which warrants either terminating or restricting his law license for a period of time under Section 7 of the Procedures Regulating Professional Conduct ("Procedures"). Under the American Bar Association Standards for Imposing Lawyer Sanctions, the distinction in the propriety of assessing disbarment versus suspension is drawn as follows:

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

Compendium of Professional Responsibility Rules and Standards §§ 5.11, 5.12 (1999 Ed.).

It would seem at first blush that Mr. Wilson's criminal conduct militates more in favor of disbarment than suspension. But as already noted, in Wilson IV this court made it clear that automatic disbarment was not appropriate and that aggravating and mitigating circumstances must be looked to in deciding the proper sanction. Those circumstances are:

Aggravating Factors:

(a) prior disciplinary offenses;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(e) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with [the] rules or orders of the disciplinary agency;

(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(g) refusal to acknowledge [the] wrongful nature of [the] conduct;

(h) vulnerability of [the] victim;

(i) substantial experience in the practice of law;

(j) indifference to making restitution;

(k) illegal conduct, including that involving the use of controlled substances.

Mitigating Factors

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify [the] consequences of [the] misconduct;

(e) full and free disclosure to [the] disciplinary board or cooperative attitude towards [the] proceedings;

(f) inexperience in the practice of law;

(g) character or reputation;

(h) physical disability;

(i) mental disability or chemical dependency including alcoholism or drug abuse when;

(1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;

(2) the chemical dependency or mental disability caused the misconduct;

(3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

(j) delay in [the] disciplinary proceedings;

(k) impositions of other penalties or sanctions;

(l) remorse;

(m) remoteness of prior offenses.

Model Standards for Imposing Lawyer Sanctions §§ 9.22 and 9.32 (1992).

Of the mitigating factors, the following appear relevant to this case:

absence of a prior disciplinary record;
reputation;
delay in [the] disciplinary proceedings;
imposition of other penalties or sanctions.

Mr. Wilson had ample letters of recommendation from community leaders. He has also engaged in public service since his misdemeanor convictions both in terms of public interest litigation and service in the Arkansas General Assembly. But two circumstances appear particularly pertinent--delay in the disciplinary proceedings and imposition of other penalties and sanctions.

The conduct of Mr. Wilson at issue in this appeal occurred almost twenty years ago. Ten years ago, he admitted his guilt to five misdemeanors based on a plea agreement and served time in prison. He stated in his testimony before the circuit judge in the instant case that he lost his farm as part of the punishment. Since 1985, with the exception of a few months, he has been suspended from practicing law in the federal courts. He was disbarred from practice in the state courts following the decision of the circuit judge prior to the appeal in Wilson IV for more than two years. These formal disciplinary proceedings have been going on now for ten years. There is no doubt that Wilson has already experienced significant penalties and sanctions for his conduct.

We note in addition that certain aggravating factors are absent in this case. Mr. Wilson's misdemeanor pleas were for conduct perpetrated against the federal government and not for conduct against a vulnerable and susceptible client. While this does not excuse Mr. Wilson's conduct, it eliminates an aggravator that might have otherwise been present. Nor do we glean from the record that Mr. Wilson engaged in a bad-faith obstruction of the disciplinary proceedings or that he engaged in deceptive practices before the Committee.

Taking all of these circumstances under consideration, the circuit judge was correct that disbarment was not an appropriate sanction. However, any decision along these lines must be measured against the yardstick of Neal v. Hollingsworth, 338 Ark. 251, 992 S.W.2d 771 (1999), because in that case we found disbarment to be the appropriate sanction after considering for the first time the American Bar Association standards for mitigators and aggravators. In the Hollingsworth case, the embezzlement of money from a client was involved. There are many aspects in this case that distinguish it from Hollingsworth. In Hollingsworth, the circuit judge found (and we agreed) that Hollingsworth had knowingly diverted funds for his own use from an estate whose primary beneficiary was a vulnerable widow (an aggravating circumstance) and then had tried to cover up the diversion of funds by not answering his client's questions or giving her the requested accountings. This conduct occurred more recently than Mr. Wilson's and for a significant period of time--more than five years--from 1989 to 1994. The result of this conduct was a finding by the circuit judge that Hollingsworth had committed eight rule violations:

Rule 1.1 --Competence
Rule 1.3 --Diligence
Rule 1.4(a) --Communication
Rule 1.5(a)(b) --Fees
Rule 1.15(a)(b)(c) --Safekeeping Property
Rule 3.2 --Expediting Litigation
Rule 4.1 --Truthfulness in Statements to Others
Rule 8.4(c)(d) --Misconduct

In the case before us, there was also a pattern of misconduct but for a shorter period of time, and it involved a victim (the government) that was not a vulnerable client. In addition, Mr. Hollingsworth termed his misconduct a "technicality" while Mr. Wilson pled guilty to his wrongdoing. There is also the point that Mr. Wilson's public interest litigation and public service in the General Assembly occurred after his misconduct. Mr. Hollingsworth's misconduct occurred after much of his public service and after he had been a licensed attorney for more than nineteen years.

The fact that Mr. Hollingsworth was never charged with embezzlement and Mr. Wilson was charged with a crime is not a critical distinction. The findings of the circuit judge in Hollingsworth equate to a finding of embezzlement and a coverup, though Hollingsworth was never charged, perhaps due to the reluctance of the widow to bring charges. In short, the circumstances surrounding Mr. Hollingsworth's conduct, which amounted to stealing from an estate for more than five years, where his client, the widow, was the executrix and primary beneficiary, appear more dire and pronounced than Mr. Wilson's wrongdoing against the government for a shorter period of time.

The remaining issue is whether Mr. Wilson should be suspended for a period of years or disbarred for a period of years. This court does have precedent for meting out a disbarment sanction for a fixed term of years. See Weems v. Supreme Court Committee on Professional Conduct, 257 Ark. 673, 523 S.W.2d 900 (1975) (disbarment assessed by circuit judge reduced by this court to a term of three years). Though Mr. Wilson equates a five-year suspension to disbarment in his brief on appeal, the distinction between suspension and disbarment is obviously a critical one. Following a suspension for a term of years, an attorney may apply for reinstatement under Section 7K of our Procedures, which entails little more than showing the Committee that his license fees are current and that he did not practice law during the period of suspension. Following disbarment, however, an application for readmission to the bar made to the Board of Law Examiners as well as approval by this court are required and that

is much more onerous. See Procedures § 7L. This is comparable in effect to an initial application to practice law and entails a character and fitness evaluation by the Board of Law Examiners and even, in some cases, taking the bar exam again.

Additionally, when a disbarment is based on dishonesty, readmission is an impossibility. Section 7L(2)(c) of the Procedures provides that readmission shall not be allowed if:

(c) Any of the grounds found to be the basis of a disbarment or any grounds presented in a voluntary surrender of law license are of the character and nature of conduct that reflects adversely on the individual's honesty or trustworthiness, whether or not the conviction of any criminal offense occurred.

As already noted, this court affirmed the fact that Mr. Wilson's conduct involved dishonesty and reflected adversely on his fitness to practice law in Wilson IV. Thus, our procedures slam the door on any potential readmission by Mr. Wilson, even if his disbarment is only for a term of years.

Finally, it is necessary to address two other opinions in this case. Justice Smith agrees that disbarment is not an appropriate sanction. He maintains, however, that our Procedures should be construed so as to limit the circuit judge and this court to a one-year suspension. That is not a correct reading of our Procedures. Under the Procedures in force in 1990, they provided that the Committee was authorized to suspend an attorney from the practice of law for one year. (FN2) But, a separate section of the Procedures sets forth the authority of the circuit judge as opposed to the Committee, once a disbarment action has been filed in that court. If a finding is made that one or more of the Model Rules of Professional Conduct have been violated, the circuit judge in a disbarment action "shall caution, reprimand, suspend, or disbar such attorney as the evidence shall warrant." 1990 Procedures, § 5G. (2). Thus, the whole panoply of sanctions is available to a circuit judge and, concomitantly, to this court. And there is no basis for concluding that because the Committee can suspend a lawyer from the practice for up to one year, circuit judges are similarly limited when meting out sanctions in a disbarment action. Our rules are so clear on this point that there is no valid basis for

invoking the canons of statutory construction, as Justice Smith has done. To do so takes a limitation on the Committee's power and impresses it on the circuit judges in disbarment proceedings, which was never contemplated by our Procedures. In sum, the circuit judge in this case had the authority to suspend Mr. Wilson from the law practice for five years.

Nor do I see that Mr. Wilson's due process rights were jeopardized by imposition of a sanction (five-year suspension) of which he contends he had no notice. Again, our Procedures clearly give circuit judges full authority to suspend as the evidence warrants in disbarment matters. This court has found a violation of an attorney's due process rights when that attorney was not notified of a specific rule violation for which he or she might have been sanctioned. See, e.g., Colvin v. Committee on Professional Conduct, 305 Ark. 239, 806 S.W.2d 385 (1991). Here, though, Mr. Wilson was fully apprised of the fact that his sanction might be disbarment. Under these facts it makes little sense to contend that the assessment of a lesser sanction which is authorized by our Procedures violated his right to due process.

Finally, there is the dissenting opinion of the chief justice which favors total disbarment. The dissent falls into the same trap as the circuit judge in Wilson IV and fails to consider the ABA standards for aggravating and mitigating circumstances. In particular, the dissent discounts the aggravating circumstances of a vulnerable client and a coverup, which were present in Hollingsworth but not in the instant case. There is, too, the point that Mr. Hollingsworth was found to have violated eight of our Model Rules for more than five years. Mr. Wilson was found to have violated one. Of course, it is vastly easier to look at Mr. Wilson's conduct and say that dishonesty was involved twenty years ago and, thus, permanent disbarment is warranted, without examining the mitigating and aggravating factors in this case. That, however, is contrary to what we held in Wilson IV, where we stated that the circuit judge, and by necessity this court as well, must look to all the circumstances of each case.

GLAZE and CORBIN, JJ., not participating.

ARNOLD, C.J., THORNTON and SMITH, JJ., and Special Justices JAMES E. BURNETT and JAY F. SHELL concur in part and dissent in part.

CONCURRING & DISSENTING

W.H. DUB" ARNOLD, Chief Justice, concurring in part; dissenting in part.

I respectfully disagree with my fellow justices that disbarment is not the appropriate sanction in this case. The appropriate sanction is not only important to the appellant in this case, Mr. Wilson, but it is ultimately important to the entire legal profession, in that this court has previously held that appellant's conduct constituted a violation of Rule 8.4(b) of the Model Rules of Profession Conduct, which regards the commission of a "criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." See Wilson v. Neal, 332 Ark. 148, 964 S.W.2d 199 (1998) (noted as Wilson IV by my colleagues). Mr. Wilson was convicted of five counts of "knowingly" converting money and property that belonged to the federal government in violation of the law. This court agreed with [*236] the trial court that these convictions, even though they were misdemeanors, involved dishonesty and a breach of trust, and seriously undermined "the confidence of the public in our legal profession." Id. at 161, 964 S.W.2d at 205-06, (quoting In re Lee, 305 Ark. 196, 806 S.W.2d 382 (1991)).

The power to regulate and define the practice of law is a prerogative of the judicial department as one of the divisions of government. See Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994); Weems v. Supreme Ct. Comm. on Prof. Conduct, 257 Ark. 673, 523 S.W.2d 900 (1975), reh'g denied, 257 Ark. 685-A, 523 S.W.2d 900 (1975). Our responsibility is set forth explicitly in Amendment 28 to the Arkansas Constitution, which states: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." This court accepted the responsibility assigned to it by the Constitution and set the

standards high in order to protect the public, as well as the integrity of the legal profession. We have held that truthfulness, honesty, and candor are "necessary characteristics for establishing a candidate's good moral character and hence his or her fitness to practice law." Shochet v. Arkansas Board of Law Examiners, 335 Ark. 176, 187, 979 S.W.2d 888, 894 (1998) (quoting Application of Jenkins, 467 A.2d at 1088).

Each year, law school graduates who have passed the bar examination appear before the Supreme Court to take the oath of office. A portion of that oath states: "I will, to the best of my ability, abide by the Model Rules of Professional Conduct and any other standards of ethics proclaimed by the courts...." These same graduates are reminded that they have become a part of the legal system and that they must be good stewards for the profession. What example is set when lawyers violate the rules, and the proper sanction is not imposed? Lawyer professionalism will be taking a tremendous toll on public trust and confidence.

Our court has demanded of the lawyers of this State high standards; and, as late at June of last year, in Neal v. Hollingsworth, 338 Ark. 251, 992 S.W.2d 771 (1999), this court held that a violation of trust and dishonesty would not be tolerated. We said in Hollingsworth:

This type of misconduct can only be characterized as serious, substantial, and egregious. Under these circumstances, we hold that the trial court clearly erred when it imposed a mere six-month suspension from the practice of law. The only appropriate sanction commensurate with Mr. Hollingsworth's actions is disbarment.

Id. at 276, 992 S.W.2d at 784.

In the case now before us, my colleagues admit that when applying appellant's conduct to the American Bar Association Standards for Imposing Lawyer Sanctions, disbarment clearly appears to be the appropriate sanction, based on appellant's actions. In light of our decision in Hollingsworth, they attempt to

distinguish and minimize Mr. Wilson's conduct based, primarily, upon the fact that the victim in Wilson's case was merely the government, and not a client, as was the case in Hollingsworth. I find that distinction to be rather offensive, given that the government is the "people"; and those "people" happen to be you and me.

It is hard for me to believe that my fellow justices could conclude that Mr. Wilson's conversion of government property, among other crimes, warrants any sanction less than complete disbarment--particularly in light of our decision in Hollingsworth. I might also point out that Mr. Hollingsworth, unlike Mr. Wilson, was neither charged, convicted, nor served time in the [**297] penitentiary for his actions. It is clear that Hollingsworth is, indeed, distinguishable from Wilson; however, in my opinion, Wilson is more egregious than Hollingsworth.

Finally, I must take exception to my fellow justices' logic regarding the reason disbarment for a term of years would be an inappropriate sanction. They state that if this court were to disbar the appellant for a term of years, rather than a lifetime disbarment, that fixed-term disbarment would be tantamount to a complete disbarment, since appellant would have to apply for reinstatement under Section 7K of our Procedures and would never be readmitted because the very basis of his disbarment is conduct involving dishonesty. What? This analysis is illogical.

In other words, it is apparently the opinion of my fellow justices that the appellant should not be disbarred for a term of years, even though his conduct warrants disbarment, because that very conduct would keep him from ever having been admitted to the bar in the first place. What better argument for complete disbarment than that very rationale?--let us not disbar him, because based on his conduct, if we do so, he could never be readmitted to the bar. That is ludicrous and is a pathetic reason for imposing a lighter sanction. I believe my fellow justices have lost sight of the fact that it is a privilege to hold an attorney's license, not a God-given right.

In my opinion, the decision in this case in no way advances the public trust and confidence in our profession. I believe a dangerous precedent is being set, moving the standard which guides the actions of attorneys to a considerably lower level. I, therefore, respectfully dissent.

Special Associate Justice JAY F. SHELL joins.

CONCURRING & DISSENTING

LAVENSKI R. SMITH, Justice, concurring in part; dissenting in part.

I concur with the court that sanctions are warranted. The practice of law is a high privilege, and those who receive that privilege must adhere to the standards of conduct prescribed for the profession. Failure to do so not only warrants but demands appropriate sanction. Two justices are of the view that the circuit court could impose a five-year suspension under the rules in effect in 1990. I disagree and would hold that the better reading of the applicable rules would limit the suspension sanction to one year. Moreover, I believe the preferred policy would be to not favor long-term suspensions. The majority dismisses the need to apply the construction canons to interpret our rules because of their presumed clarity. With respect to sanctions, our rules are not so clear as they suppose when the potential exists for imposition of suspensions for unlimited and perhaps arbitrary terms. The public is not best protected from unscrupulous attorneys by having them remain out of the practice of law for a decade, then potentially return to practice having been apart from the profession for such an extended period. The majority cites no case under the modern rules imposing a five-year or greater suspension from the practice law. Surely, outright disbarment would be a better policy for the public's good as compared to long-term suspension. Here, we have the interesting circumstance where a disbarred attorney could seek reinstatement sooner than an attorney suspended for five years. See, In the Matter of Wayne R. Williams, 265 Ark. 480, 592 S.W.2d 438 (1979). Williams surrendered his license rather than face almost certain disbarment for grossly unethical conduct.

Three years later, he petitioned for and received reinstatement to the practice of law.

A closer examination of the applicable rules is in order. Section 7 of the applicable 1990 procedures is entitled "Sanctions." Paragraph A is entitled, "Sanctions Authorized." Under this section, the Committee is authorized to warn, issue a caution or reprimand, suspend the attorney for one year, or file a disbarment action in circuit court. In this case, the Committee filed an action in circuit court. Once the Committee files a disbarment action, if sanctions are required the sanctions will be imposed by the trial court in accordance with a different section, specifically Section 5(G)(2). Wilson IV, supra. Section 5(G)(2) provides that if the circuit court finds the attorney has violated the "Model Rules, he shall caution, reprimand, suspend, or disbar such attorney as the evidence may warrant."

It is evident that the rules contain two sections regarding sanctions, one describing those available to the Committee, and the other describing those available to the trial court. The list in both sections contains the same categories of sanctions with the exception of the trial court's list, which includes the additional sanction of disbarment.

In Section 7, the Committee's authority to suspend was [**299] expressly limited to one year. (FN3) Section 5(G)(2) dealing with the trial court contains no such limitation. It is indeed proper to ask whether the suspension authority given the trial court in Section 5(G)(2) describing the committee's procedure exceeds that expressly outlined in Section 7. Section 5 of the Committee's Procedure Rules, appearing prior to Section 7 in the rules, specifically addresses the "Procedure" to be followed by the Committee in pursuit of its obligation to investigate and sanction violations. In subsections designated (A) through (H), Section 5 outlines the Committee's general investigatory authority (A), the notice to be given the attorney (B), the response time (C), the manner of voting by committee (D and E), committee hearing procedures (F), the committee's obligation to institute disbarment (G), and the attorney's appeal rights (H). The language addressing

the Circuit Court's authority to sanction appears in (G)(2) and lists four possible sanctions actions--caution, reprimand, suspension, or disbarment. The actions are not defined. Nor are they expressly distinguished from the Committee's sanction list in Subsection 7(A).

While it is clear that the circuit court's responsibility to sanction attorneys in disbarment actions is listed separately in the rules and can include disbarment, it is not as clear whether the court's suspension of an attorney from the practice of law can exceed that stated in the Committee's sanction list in Subsection 7(A). Arguably, in that the circuit court has separate sanction authority stated in 5(G)(2), it could suspend an attorney from the practice for any period of time. Perhaps, the court could suspend an attorney for ten years or even twenty years. We construe our rules using the same means, including canons of construction, as are used to construe statutes. Gannett River States Pub. Co. v. Ark. Jud. Discip. & Disab. Comm., 304 Ark. 244, 801 S.W.2d 292 (1990). The fundamental principle used in considering the meaning of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning. Munson v. State, 331 Ark. 41, 959 S.W.2d 391 (1998).

However, where the applicable statute is penal in nature, i.e., imposes a penalty or punishes conduct, we have long held that it is to be strictly construed. Hughes v. State, 6 Ark. 131 (1845). Moreover[**300] , we have held that in construing such statutes, all doubts are to be resolved in the favor of the defendant and nothing is taken as intended which is not clearly expressed. State v. Lewis, 335 Ark. 188, 979 S.W.2d 894 (1998)

THORNTON, J., and Special Justice JIM BURNETT join.

(FN1.) According to Wilson I, the amount borrowed by Mr. Wilson from the FmHA in 1981 and 1982 was approximately $775,230. A federal grand jury indicted him based on his disposition of the proceeds from multiple crop sales and the transfer of funds from a joint bank account with the FmHA to his law firm account, all in an effort to avoid the FmHA lien. In 1985,

he was tried on various felony counts and found guilty of one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, forty counts of knowingly disposing of property mortgaged to a government agency in violation of 18 U.S.C. § 658, and seven counts of unlawfully converting government property in violation of 18 U.S.C. § 641. His judgment of conviction was reversed by the Eighth Circuit Court of Appeals due to a Batson violation at his jury trial. United States v. Wilson, 815 F.2d 52 (8 th Cir.1987). On remand to the federal district court, Mr. Wilson pled guilty to the five misdemeanors noted in this opinion.

(FN2.) Section 7E(2) of the Procedures now in force, which were adopted by this court in 1998, authorizes the Committee to suspend a lawyer's license "not in excess of two (2) years."

(FN3.) The amended version of this Section now in effect expanded the Committee's authority to suspend up to two years.

APPENDIX 2

SUPREME COURT OF ARKANSAS
JUSTICE BUILDING
625 MARSHALL STREET
LITTLE ROCK, ARKANSAS 72201

June 22, 2000

Mr. E. Dion Wilson
Attorney at Law
423 Rightor Street
Helena, AR 72342

Mr. Robert J. Donovan
Attorney at Law
PO Box 646
Marianna, AR 72360

Re: Jimmie L. Wilson v. James A. Neal, as Executive Director of the Supreme Court Committee on Professional Conduct Arkansas Supreme Court No. 99-103

Gentlemen:

In regard to my dissent in the above matter which was handed down on May 11, 2000, the following change has been made in the third full paragraph on page 3:

> "It is hard for me to believe that my fellow justices could conclude that Mr. Wilson's conversion of government property and conspiracy to defraud the Federal Government of well over $700,000, among other crimes, warrants any sanction less than complete disbarment . . ." has been changed to read as follows:

> "It is hard for me to believe that my fellow justices could conclude that Mr. Wilson's conversion of government property, among other crimes, warrants any sanction less than complete disbarment. . ."

Thank you for your attention to this matter,

Sincerely,

/s/ W. H. "Dub" Arnold
W. H. "Dub" Arnold

mw
cc: All Justices

APPENDIX 3

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
JUSTICE BUILDING
625 MARSHALL STREET
LITTLE ROCK, ARKANSAS 72201

June 29, 2000

E. Dion Wilson
Attorney at Law
423 Rightor Street
Helena, AR 72342

Eugene G. Sayre
Attorney at Law
3400 TCBY Tower
425 W. Capitol Avenue
Little Rock, Ar 72201

Re: 99-103 Jimmie L. Wilson v. James A. Neal

Gentlemen:

The Supreme Court made the following orders in the above styled case today:

"Petition for rehearing is denied."
"Appellant's motion to cite authorities outside of petition is denied."
"Motion of Lake View School District No. 25 of Phillips County, Arkansas, to file amicus curiae brief in support of appellant's petition for rehearing is denied."

Sincerely,

/s/

Leslie W. Steen, Clerk

LWS: rh

cc: Robert J. Donovan
Wand M. McIntosh, Clerk
(CIV-91-147)

APPENDIX 4

NEAL V. WILSON
873 S.W.2d 552, 316 Ark. 588 (Ark. 1994)
• Opinion •

Supreme Court of Arkansas.

James NEAL, as Executive Director of the
Supreme Court Committee on Professional Conduct, Appellant,
v.
Jimmie L. WILSON, Appellee.
No. 93-691.
April 18, 1994.

COUNSEL

Robert J. Donovan, Marianna, for appellant.

Jerry L. Malone, Little Rock, for appellee.

OPINION
LEAD HOLT, Chief Justice.

The appellant, James A. Neal, in his capacity as Executive Director of the Arkansas Supreme Court Committee on Professional Conduct, brings an appeal from the circuit court's order granting appellee Jimmie L. Wilson's motion to dismiss disbarment proceedings on the basis of the running of the statute of limitations. Mr. Neal has raised five points for reversal, arguing that (1) the trial court erred in finding that the disbarment proceeding was barred by the statute of limitations because no statute of limitations is applicable to disbarment proceedings; (2) alternatively, the trial court erred in finding that the disbarment proceeding was barred by the statute of limitations because any applicable statute of limitations had not run; (3) the trial court erred in finding that Mr. Wilson may have altered his position by

agreeing to plead guilty to misdemeanor charges on the assumption that the Committee would take no further action; (4) the trial court erred in finding that rules of professional conduct were being applied that did not exist at the time the misconduct occurred; and (5) this court should hear the case de novo and pronounce such judgment as we may determine should have been pronounced below.

We agree with Executive Director Neal's contention that the trial court erred in finding that the effective rules were those in force at the time of Mr. Wilson's misconduct in 1982 rather than at the time of his guilty plea in 1990 and that the proceeding was therefore barred by the statute of limitations. For this reason, we reverse the trial court and remand this matter for further proceedings. We do not address the remaining issues relating to the circuit court's decision because its order was predicated on the running of the statute of limitations and is consequently limited in this regard. We further decline to pronounce judgment as requested by the Executive Director in his fifth point on appeal.

Facts

In 1981 and 1982, appellee Jimmie L. Wilson, an attorney and farmer, borrowed approximately $775,230 from the Farmers Home Administration, a federal entity, for farm-operating expenses. The loan was secured by an FmHA lien on Mr. Wilson's crops. A federal grand jury subsequently indicted him on various criminal charges relating to the disposition of proceeds from crop sales and the transfer of funds maintained in a joint bank account established [**591] in the names of the FmHA, Mr. Wilson, and his wife.

Following a jury trial in 1985 in the United States District Court for the Eastern District of Arkansas, Mr. Wilson was found guilty of one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, forty counts of knowingly disposing of property mortgaged to a government agency in violation of 18 U.S.C. § 658, and seven counts of unlawfully converting to his own use money belonging to the United States in violation of 18

U.S.C. § 641. He was sentenced to imprisonment for thirty months on the first count and to lesser concurrent terms on the others. The sentence was stayed pending appeal. On May 15, 1985, District Judge G. Thomas Eisele suspended Mr. Wilson from the practice of law in federal court "until final disposition of any disciplinary proceedings commenced in connection with the conviction."

Meanwhile, on May 2, 1985, Darrell F. Brown, attorney for Mr. Wilson, sent the following request to Joe Phillips, Executive Secretary of the Supreme Court Committee on Professional Conduct:

In order that Mr. Jimmy Wilson will be aware of the policy of the Committee resulting from our discussion, I would appreciate you forwarding to me a "To Whom It May Concern" type letter advising that at this time it is the position of the Committee not to revoke the license until the appellate process has been exhausted....

On May 8, 1985, Mr. Phillips responded with the following statement:

It is presently the policy of the Committee on Professional Conduct not to take any action against a licensed attorney who has been convicted of a crime until the appeal process for that attorney is completed.

Mr. Wilson appealed his conviction, which was affirmed by the Eighth Circuit Court of Appeals in U.S. v. Wilson, 806 F.2d 171 (8th Cir.1986).

One of the issues raised in that appeal, based on Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), was whether Mr. Wilson, who is black, had been denied his due process and Sixth Amendment rights due to the government's use of peremptory challenges to strike six of seven black venirepersons. While the Eighth Circuit found no basis for reversal in Batson at that point, the United States Supreme Court opinion in Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) caused the Court of Appeals to vacate its earlier decision and to

remand Mr. Wilson's case for a Batson hearing. U.S. v. Wilson, 815 F.2d 52 (8th Cir.1987).

The District Court held a Batson hearing in July 1987 and concluded that race was not a factor in the government's exercise of its peremptory challenges. In U.S. v. Wilson, 884 F.2d 1121 (8th Cir.1989), the Eighth Circuit, ruling that the prima facie case of discrimination had not been overcome, reversed and remanded the matter for a new trial.

Rather than being subjected to a new trial on the existing felony charges, Mr. Wilson was charged on August 20, 1990, in a five-count misdemeanor information with three counts of converting property mortgaged or pledged to a farm credit agency to his own use in violation of 18 U.S.C. § 658 and two counts of converting public money, property, or records to his own use in violation of 18 U.S.C. § 641. Mr. Wilson appeared before federal District Judge Stephen Reasoner on August 22, 1990, and pled guilty to each misdemeanor count. The plea and its acceptance were conditioned upon the dismissal of all pending felony charges of which Mr. Wilson had previously been convicted. Judgment was entered on December 26, 1990, and Mr. Wilson was sentenced to four-and-one-half months' imprisonment on the first count (§ 658). With respect to the remaining counts, he was placed on probation for a three-year period which was to run consecutively to the jail term. Immediately following entry of the 1990 state conviction, District Judge Eisele issued an order again suspending Mr. Wilson from federal practice "until the final disposition of any disciplinary proceedings commenced in connection with the conviction."

On March 29, 1991, the appellant, James A. Neal, notified Mr. Wilson of a pending complaint before the Arkansas Supreme Court Committee on Professional Conduct ("the Committee"), "predicated on your entry of a plea of guilty to certain criminal offenses on August 22, 1990, in the United States District Court for the Eastern District of Arkansas." Mr. Neal noted that "It [**593] appears the allegations of this complaint come under Rules 8.4(b) and 8.4(c) of the [amended] model rules."

Mr. Wilson's attorney, Darrell F. Brown, in a letter dated April 15, 1991, sought an extension of time for filing a response from April 23, 1991, the twentieth day following notification, until August 30, 1991. Responding by a letter dated April 19, 1991, Mr. Neal granted an extension to May 20, 1991. Mr. Brown mailed another request for an extension on May 16, 1991, which was not received by the Committee until May 20, the final day of the extended period. On June 10, 1991, Mr. Neal advised Mr. Brown that "the request for an additional extension is denied." Moreover, the Executive Director declared, "the complaint is being processed to the Committee for its determination."

By a certified letter dated and mailed on July 22, 1991, Mr. Neal informed Mr. Wilson of the following:

It is the unanimous decision of the Committee that your conduct in this matter violated the Model Rules of Professional Conduct, as amended. It is the further decision of the Committee to institute disbarment proceedings against you on the basis of that conduct.

In lieu of the filing of a disbarment suit, the Committee will give you the opportunity to voluntarily surrender your Arkansas attorney's license....

Mr. Brown responded on behalf of his client in a letter dated July 24, 1991, informing the Executive Director that Mr. Wilson "disagrees with the decision of the committee to institute disbarment proceeding and at this time does not wish to voluntarily surrender." In addition, the appellee's attorney advised the Committee that the matter was still on appeal in the Eighth Circuit Court of Appeals. (The record, however, does not support the attorney's contention.)

On October 9, 1991, Mr. Neal, as Executive Director of the Committee on Professional Conduct, filed a complaint for disbarment in the Phillips County Circuit Court pursuant to Section 6B(1) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, which were adopted on

a trial basis by per curiam order on July 16, 1990. Section 6B(1) requires the Committee to institute a disbarment action when the complaint against an attorney is based on a conviction of a felony or a criminal act that, under the terms of Rule 8.4(b) of the Model Rules of Professional Conduct, reflects adversely on the attorney's "honesty, trustworthiness or fitness as a lawyer in other respects."

Mr. Wilson filed a motion to dismiss for failure to state a cause of action. In the motion, Mr. Wilson asserted that he had not, under the terms of Section 6B(1) of the Procedures, been convicted of a felony and that, within the meaning of the language of Rule 8.4(b), he had not committed a criminal act that reflects adversely on his honesty, trustworthiness, or general fitness as a lawyer. He characterized the conduct to which he had pled guilty as nothing more--apart from the involvement of an agency of the federal government--"than a simple breach of contract."

On December 18, 1991, the Committee filed a motion for summary judgment. Mr. Wilson filed a supplement to his motion to dismiss on February 21, 1992, in which he stated:

6. Rule 8.4(b), the rule which Defendant is accused of violating, was adopted by per curiam order of the Arkansas Supreme Court on December 16, 1985, and became effective on January 1, 1986. These rules apparently replaced the then-existing Code of Professional Responsibility adopted by per curiam order of June 21, 1976 (See 260 Ark. 910), which became effective on July 1, 1976. Consequently, the Model Rule which the defendant is accused of violating was not in existence at the time of the alleged conduct which provides the basis for these disbarment proceedings. (Further, the Procedures, including Sections 5.6 and 6.B. (1), were not adopted until the Arkansas Supreme Court did so on a trial basis by per curiam order of July 16, 1990.)

In addition, Mr. Wilson asserted that disbarment proceedings are civil in nature and are subject to the rules of civil procedure, which entail application of a five-year statute of limitations to offenses which occurred nine to eleven years earlier.

A hearing was held on April 6, 1992. In a letter opinion [**595] dated February 16, 1993, the trial court reiterated its finding at the hearing that the statute of limitations applied. The circuit judge also commented that Mr. Wilson's due process rights would be violated by adherence to rules of professional conduct not in effect at the time the misconduct occurred. He further stated:

The Court is convinced that Mr. Wilson conducted himself in a manner, because of which the committee, had it acted in a more timely fashion, could have disciplined him under an appropriate rule.... [I]t appears that the State Committee ill advisedly waited for the Federal Committee to perform. However, the Federal Committee did suspend Mr. Wilson's privilege of practicing law in the Federal Courts in 1985. Yet, the State Committee still took no position.

Whether it comes under the statute of limitations, laches, waiver or some other legal theory, Mr. Wilson may well have agreed to the misdemeanor charge, after two felony conviction reversals, on the premise that the state was going to do nothing and thus altered his position for several possible reasons.

The State Committee chose to wait too long, and the defendant's motion to dismiss is granted and the State's complaint for suspension is dismissed.

On March 3, 1993, the trial court's formal order of dismissal was filed, along with its letter opinion; based on the reasons set forth in the opinion, and primarily on the application of the statute of limitation, Mr. Wilson's motion to dismiss was granted, and the Committee's complaint was dismissed with prejudice, as well as its motion for summary judgment upon its complaint, which was denied for mootness. A notice of appeal was filed on March 15, 1993.

Standard of review

[1][2] The present appeal arises from the judgment of the circuit court dismissing the complaint for disbarment filed by Mr. Neal on behalf of the Committee. In reviewing a trial court's decision on a motion to dismiss under Ark.R.Civ.P. 12(b)(6), we treat the facts alleged in the complaint as true and view them [**596] in the light most favorable to the party who filed the complaint. Gordon v. Planters & Merchants Bancshares, Inc., 310 Ark. 11, 832 S.W.2d 492 (1992); Battle v. Harris, 298 Ark. 241, 766 S.W.2d 431 (1989). In deciding such motions, the trial court must look only to the allegations in the complaint. Wiseman v. Batchelor, 315 Ark. 85, 864 S.W.2d 248 (1993); Deitsch v. Tillery, 309 Ark. 401, 833 S.W.2d 760 (1992).

Here, the complaint, filed on October 9, 1991, provided pertinent information about Mr. Wilson's pleas of guilty on the misdemeanor charges as well as considerable detail about the conduct that ultimately led to those pleas. Included were the dates 1981 and 1982 for the illegal grain sales and fund transfers as well as the August 1990 plea proceedings. Accepting those dates as true, the circuit court determined that the statute of limitations was applicable and prohibited the Committee from pursuing the disbarment proceeding.

[*557] Judicial authority to regulate practice of law

[3] The power to regulate and define the practice of law is a prerogative of the judicial department as one of the divisions of government. Weems v. Supreme Ct. Comm. on Prof. Conduct, 257 Ark. 673, 523 S.W.2d 900 (1975), reh'g denied, 257 Ark. 685-A, 523 S.W.2d 900 (1975). Our responsibility is set forth explicitly in Amendment 28 of the Arkansas Constitution: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law."

Statute of limitations and rules of professional conduct

[4] The issues involving the applicability of the statute of limitations and the rules of professional conduct promulgated by this court are closely intertwined. It is, however, unnecessary for

us to address the questions raised concerning the applicability and running of the statute of limitations because the operative Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, adopted (prior to Mr. Wilson's guilty plea) by per curiam order on July 16, 1990, focus upon the fact of conviction rather than the allegation of misconduct. The entire question of the statute of limitations is, therefore, a non-issue. The Committee's action for disbarment, filed on October 9, 1991, was by any definition timely, having followed [**597] Mr. Wilson's plea of guilty on August 22, 1990, by approximately thirteen and one-half months.

[5] This consideration brings us to the Executive Director's fourth point for reversal, in which he asserted that the trial court erred in finding that the rules of professional conduct that were invoked by the Committee in its disbarment action did not exist at the time of the misconduct and, as a result, that Mr. Wilson was denied due process of law.

Implicit in the trial court's letter opinion is the view that the operative rule at the time of Mr. Wilson's misconduct was Rule X of the Rules of the Court Regulating Professional Conduct of Attorneys at Law, 260 Ark. 910 (1976), adopted by per curiam order on June 21, 1976, and made effective July 1, 1976. That rule provided, in relevant part:

If an attorney has been convicted of a felony or infamous crime under the laws of any State or the United States, a charge may be made by complaint filed with the Committee with the Clerk of a Court of proper venue under these Rules.... The sole issue to be determined shall be whether the crime warrants discipline and, if so, the extent thereof....

(Emphasis added.) Rule X afforded the Committee greater discretion in filing a complaint than is now the case, and the conduct in question, consisting of either a "felony" or an "infamous crime," was narrower in scope than at present.

Section 6A of the current Procedures states that:

All prosecuting attorneys and judges participating in or presiding over a hearing in which an attorney is convicted of, pleads guilty to, or pleads nolo contendere to a crime which is a Class A misdemeanor or greater offense, shall have the duty to report such conviction or plea to the Executive Director.

(Emphasis added.) Section 6B(1), under which the Executive Director filed his complaint on October 9, 1991, states, as quoted earlier, that:

When a complaint against an attorney is based on a conviction of a felony or a crime which also violates Rule [**598] 8.4(b) of the Model Rules of Professional Conduct, the Committee shall institute an action of disbarment.

(Emphasis added.)

As Section 6 clearly indicates, it is the conviction, or, as in this instance, the guilty plea, that triggers the mandatory disbarment action against an attorney. Prior to conviction, no such action is required. As a practical matter, the present Procedures emphasize taking action upon actual conviction or pleas of guilty or nolo contendere more so than conducting proceedings independently prior to trial for alleged violations of the Model Rules of Professional Conduct.

In sum, the cause of action did not accrue until August 22, 1990, the date on which Mr. [*558] Wilson entered his guilty plea. As for the 1985 felony conviction, the Committee decided, as a matter of policy stated in its letter of May 8, 1985, "not to take any action ... until the appeal process ... is completed." Granted, the Committee had the option of proceeding at the time the misconduct occurred, but it chose not to do so. Rather, it deferred to the pending federal court matter, as it had a right to do. This deferment inured to Mr. Wilson's benefit, for he was permitted to continue his practice of law in the state courts while his case meandered in its course for some ten years of trial, appeal, and rehearings in the federal system. In any event, Mr. Wilson's 1985 federal felony conviction was overturned and is irrelevant for

purposes of this appeal; we look, instead, to his 1990 conviction as the basis for the Committee's charge.

Rule 8.4(b), which defines "professional misconduct" in part as the commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," and which comprehends the misdemeanor charges to which Mr. Wilson pled guilty, was effective as part of the Model Rules of Professional Conduct on January 1, 1986, having been adopted by per curiam order on December 16, 1985. In the Matter of the Arkansas Bar Association: Petition for the Adoption of Model Rules of Professional Conduct, 287 Ark. 495, 702 S.W.2d 326 (1985). The supplemental Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, under which the Executive Director filed the complaint for disbarment, were effective on July 16, 1990, the date of our per curiam. In the Matter of Procedures of the Arkansas Supreme Court Committee Regulating Professional Conduct of Attorneys at Law, 303 Ark. 725, 792 S.W.2d 323 (1990). Both were controlling when Mr. Wilson pled guilty on August 22, 1990.

In passing, we note that Mr. Wilson's reliance on Sexton v. Supreme Ct. Comm. on Prof. Conduct, 295 Ark. 141, 747 S.W.2d 94 (1988), is misplaced. In that case, attorney Sam Sexton, Jr., was charged with misconduct under the Model Rules that became effective at the beginning of 1986. We held, however, that because the acts in question occurred in 1983, it was a violation of due process to charge Mr. Sexton under a rule that was not in effect at the time of the alleged misconduct. "Due process," we said, "requires notice that an act is punishable at the time it is committed.... It might not matter if the rules were substantively the same, but we find a significant difference between the old rule ... and the new rule...." 295 Ark. at 144, 747 S.W.2d at 96. Still, we held it permissible for the Committee to proceed under the Code of Professional Responsibility, the now-superseded body of rules that was in effect in 1983.

Two factors distinguish the Sexton case from the present appeal. There, attorney Sexton was appealing a one-year

suspension, while here the Executive Director of the Committee on Professional Conduct is appealing the dismissal of a complaint for disbarment. Further, since the Sexton decision was handed down in 1988, this court has adopted the supplementary Procedures that contain the language of Section 6B(1) making a mandatory disbarment action contingent upon "conviction of a felony or a crime which also violates Rule 8.4(b) of the Model Rules of Professional Conduct." (Emphasis added.) We hold that the Sexton case is not controlling under the circumstances.

Wilson's reliance on Committee policy

Mr. Neal maintains, in his third point for reversal, that the trial court also erred in commenting that Mr. Wilson may have altered his position by agreeing to misdemeanor charges in the belief that the Committee would take no action. As noted earlier, we do not reach this issue because the trial court's order focused [**600] on the running of the supposedly applicable statute of limitations, and our inquiry is consequently limited in scope to that question. Any speculation by the trial court regarding Mr. Wilson's motivation in entering a guilty plea amounted to unverifiable dicta.

Requested pronouncement of judgment

Relying on Section 5H(3) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, Mr. Neal requests that this Court, in its de novo review, "pronounce such judgment as in its opinion should have been pronounced below." He has, however, overlooked a crucial phrase in the section:

Appeals from any action by the Committee after hearing shall be heard de novo on the record and the Arkansas Supreme Court shall pronounce such judgment as in its opinion should have been pronounced below[.]

This appeal arises from a decision of a circuit court and is not governed by Section 5H(3).

The applicable provision, Section 5H(4) follows:

> Appeals from any judgment of a Circuit Court in a disbarment proceeding shall be heard in accordance with the rules governing appeals of civil cases.

Although disbarment proceedings are heard de novo on appeal, Weems v. Supreme Court Committee on Professional Conduct, supra, it would be inappropriate for this Court to render judgment in this case because the appeal is from a motion to dismiss. The matter must be remanded to the circuit court.

Long ago, United States Supreme Court Chief Justice John Marshall, in a disbarment case involving former Vice-President Aaron Burr, observed:

> On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the Court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the Court itself. If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case.

Ex parte Burr, 22 U.S. (9 Wheat.) 529, 530, 6 L.Ed. 152 (1824). See also Hurst v. Bar Rules Committee of the State of Arkansas, 202 Ark. 1101, 155 S.W.2d 697 (1941); Maloney v. State, 182 Ark. 510, 32 S.W.2d 423 (1930); Beene v. State, 22 Ark. 149 (1860). This, as any other disbarment proceeding, is a difficult case for consideration. Yet because the matter was dismissed by

the circuit court, we have no basis for "interposing [our] authority" at this point.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

NEWBERN, J., not participating.

APPENDIX 5

NEAL V. WILSON
900 S.W.2d 177, 321 Ark. 70 (Ark. 1995)

• **Opinion** •

Supreme Court of Arkansas.
James A. NEAL, as Executive Director of the Supreme Court Committee on Professional Conduct, Petitioner,
v.
Jimmie L. WILSON, Respondent.
No. 95-536.
June 12, 1995.

OPINION

LEAD
PER CURIAM.

On October 9, 1991, petitioner filed a disbarment proceeding against the respondent in the Phillips County Circuit Court. Respondent moved to dismiss, contending the statute of limitations had run. By letter dated December 24, 1991, Phillips County Circuit Judge Baird Kinney notified this court that both he and the other circuit judge of the 1st Judicial Circuit had recused from the proceeding involving respondent, and requested a special circuit judge be assigned to hear the matter. Pursuant to Act 496 of 1965, the Chief Justice, on February 18, 1992, assigned Circuit Judge Lance Hanshaw.

On March 3, 1993, Judge Hanshaw entered an order dismissing petitioner's action against respondent based primarily upon the statute of limitations. That order was appealed and [**72] reversed by this court's decision in Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994). The Neal decision was delivered on April 18, 1994, and rehearing was denied on May 23, 1994. By

letter dated April 20, 1994, Judge Hanshaw recused from hearing the case on remand and requested another judge be assigned to hear it. Again, pursuant to Act 496, another circuit judge, Judge John Lineberger of the 4th Judicial Circuit, was assigned on May 3, 1994, to try this case, and to hold all ancillary proceedings. By letter dated May 3, 1994, Judges Hanshaw and Baird Kinney and Phillips County Circuit Clerk, Wanda McIntosh, were notified of Judge Lineberger's assignment. The order assigning Judge Lineberger reflects it was filed with this court's clerk on May 3, 1994, but the order was not filed in the Phillips County Circuit Court proceedings until September 14, 1994. No further activity appears to have occurred in the case until some time in December of 1994, when respondent moved for Judge Lineberger's disqualification.

In respondent's motion suggesting Judge Lineberger's disqualification, he contended that, when Judge Hanshaw had recused, a new circuit judge had taken office who had not recused in this case, and, as a consequence, this proceeding automatically reverted to that circuit judge upon Hanshaw's recusal. (FN1) Judge Lineberger denied respondent's motion on January 5, 1995, and respondent took no subsequent action to contest Judge Lineberger's ruling or jurisdiction in this matter. By letter dated April 26, 1995, Judge Lineberger set a nonjury trial on the merits of the case to be heard on June 13, 1995.

The record next reflects that, on May 15, 1995, a flurry of letters was exchanged between respective parties' counsel. Respondent's counsel notified counsel for petitioner that the new 1st Judicial Circuit Judge, Judge Olly Neal, had two dates on which he could try respondent's case, but petitioner's counsel responded, stating he would not attend a hearing until Judge Neal signed an order assuming jurisdiction of the case. Petitioner was subsequently served with a notice setting a hearing in Judge Neal's court on May 18, 1995. Petitioner appeared on that date, contesting Judge Neal's jurisdiction to proceed in the matter. Judge [**73] Neal ruled he had jurisdiction to proceed and did, by deciding the case on its merits. Judge Neal's order was signed on May 24 and entered on May 25, 1995.

On May 19, 1995, petitioner filed in this court for a writ of certiorari directing that all judgments, orders and rulings made by Judge Olly Neal be declared void since Judge Lineberger had been assigned jurisdiction to try this case. On May 24, 1995, respondent moved to dismiss petitioner's request for certiorari, asserting (1) writs of certiorari are issued to direct a judge to perform a duty and Judge Neal was not made a party to this special action, (2) a petition for writ of prohibition would have been a proper remedy, but is not warranted on the facts of this case, (3) an appeal provides an adequate remedy, and (4) no grounds are recited upon which a writ of certiorari can issue in this matter.

The general rule is that certiorari cannot ordinarily be used as a substitute for appeal. However, this does not mean that actions of trial courts during the course of an action are not subject to review, in a proper case, by a court having supervisory jurisdiction, or that, in the exercise of that jurisdiction, resort may not be had to mandamus, prohibition or certiorari where appellate remedy is unavailable or inadequate. McKenzie v. Burris, 255 Ark. 330, 500 S.W.2d 357 (1973). Even if an appeal is available to petitioners, certiorari, in a court having supervisory jurisdiction, would still lie to quash a judgment which is void on its face, or to control the actions of an inferior tribunal which is proceeding illegally where no other mode of review has been provided. Id.

Here, petitioner asserts Judge Lineberger was properly assigned jurisdiction of this case, and as a consequence, Judge Neal's assumption of jurisdiction of this cause was void. We agree. While respondent complains that Judge Neal had never recused from hearing this case and therefore retained jurisdiction to hear it, that fact was never conveyed to this court at the time Judge Hanshaw's assignment was terminated or when Judge Lineberger was assigned. At the time of Judge Lineberger's assignment, the record reflected the circuit judges in the 1st Judicial District had recused, and the special assigned circuit judge, Judge Lance Hanshaw, had done so as well. Based upon that] record, this court made the new and temporary assignment of Judge Lineberger to this case pursuant to the terms of Act 496, as amended, [codified as Ark. Code Ann. §§ 16-10-101 (Repl.1994)].(FN2) At the latest,

respondent knew (or should have known) of Judge Lineberger's assignment on September 14, 1994--the date the order was filed in this proceeding in the Phillips County Circuit Court Clerk's Office. The principle is well settled that it is the duty of a litigant to keep himself informed of the progress of his case. United S. Assurance Co. v. Beard, 320 Ark. 115, 894 S.W.2d 948 (1995). Nonetheless, respondent waited nearly three months before requesting Judge Lineberger to recuse, and when respondent's request was denied, he never petitioned this court that Judge Lineberger's assignment was improper and lacked jurisdiction. In fact, respondent simply failed to act in any way to apprise this court that Judge Neal had not recused from serving in this case. Nor did he question the validity of Judge Lineberger's assignment until May of 1995, when petitioner filed this original proceeding for certiorari. In other words, respondent waited eight months after Judge Lineberger's assignment was filed in the Phillips County Circuit Clerk's office to notify this court that Judge Neal had not recused in this matter.

Why respondent failed to question Judge Lineberger's assignment earlier is unclear. Regardless, we emphasize the fact that the record before this court at the time of Judge Lineberger's assignment reflects that the circuit judges in the 1st Judicial District had recused from this case, and no party had offered any motion, objection or information to the contrary. It is the parties' or trial court's responsibility to apprise this court as to whether an assignment is necessary under Act 496. Once that assignment is made, that responsibility continues. Clearly, it is not this court's task, on its own volition, to discover or monitor whether the circumstances have changed to warrant the termination of an assignment or reassignment. The mere fact that a new circuit judge had been elected in the 1st Judicial Circuit after Judge Hanshaw's and before Judge Lineberger's assignments did not, in itself, suggest the new circuit judge had not recused from trying this case. Certainly, if respondent had notified this court of Judge Neal's willingness to serve in this matter, this court could have considered that factor in deciding whether a new assignment was required under Act 496. (FN3) Certainly, if respondent had acted earlier, petitioner would also have been afforded an early opportunity to question the propriety (or appearance of

impropriety) of Judge Neal sitting in this matter. Under the circumstances, petitioner was unable to suggest Judge Neal's disqualification until after Judge Neal belatedly attempted to exercise jurisdiction over this case in May of 1995. (FN4)

In sum, we must conclude that the record of this case reflects Judge Lineberger's assignment was valid, and accordingly that assignment gave him jurisdiction to try this litigation. That being so, Judge Neal's attempt to assume jurisdiction and to decide this matter was clearly erroneous and void. The record also reflects Judge Neal knew this case had been assigned to Judge Lineberger, who already had set this cause for trial, but Judge Neal undertook to hear and decide the case anyway. We hold that petitioner has no adequate remedy in these circumstances except certiorari. Judge Lineberger, in exercising appropriate jurisdiction, set this matter for trial on June 13, 1995, and he is necessarily the sole judge having the power and authority to proceed in this cause.

In conclusion, we touch on respondent's brief mention that Judge Neal is a necessary party to the request for certiorari proceeding. He cites no legal authority and even fails to cite or argue ARCP Rule 19, Arkansas's rule concerning the joinder of persons needed for a just adjudication. We have held that, absent convincing argument or citation of authority, we decline to address the response or argument to a petition for certiorari. We would simply state that neither Judge Neal nor Judge Lineberger has an interest related to the subject of this action between petitioner and respondent, and those judges' presence, as parties, has nothing to do with whether complete relief can be accorded in this case. Cf. Bridges v. Arkansas Motor Coaches Limited, Inc., 256 Ark. 1054, 511 S.W.2d 651 (1974); McKenzie v. Burris, 255 Ark. 330, 500 S.W.2d 357 (1973); State v. Nelson, Berry Pet. Co., 246 Ark. 210, 438 S.W.2d 33 (1969) (where petitions for writs of certiorari actions were decided by the court without trial judges being joined as parties). We would also point out that Judge Neal has never requested to be a party to this case.

Because we find Judge Neal has proceeded in excess of his authority and jurisdiction, his directives and orders relating to the

action between petitioner and respondent are quashed. Nelson, Berry Pet. Co., 246 Ark. at 221, 438 S.W.2d at 40.

NEWBERN, not participating.

BROWN and ROAF, JJ. dissent.

DISSENTING

BROWN, Justice, dissenting.

There are too many unanswered questions to allow this matter to go to trial on June 13, and a necessary party, Judge Neal, should be joined as a respondent. I would stay the trial to allow further development and consideration of the issues involved and advance the case for a decision in September.

The question that permeates all aspects of this case is why a special judge, Judge John Lineberger, was appointed to replace Special Judge Lance Hanshaw on May 3, 1994, when a duly elected circuit judge, Judge Olly Neal, who had not recused, was sitting in the district. This appears to have been a mistake. When one special judge recused, the immediate reaction must have been to appoint another special judge without remembering that in the interim a new circuit judge had been elected within the district. It is that apparent mistake that has given rise to much of this controversy.

Turning to the merits, I cannot agree with certain statements by the majority. First, I cannot agree that the record reflects that all circuit judges in the First Judicial District had recused in this case when Special Judge Lineberger was appointed. Judge Neal apparently had not. Further, I question the following conclusion: "The mere fact that a new circuit judge had been elected in the 1st Judicial Circuit after Judge Hanshaw's and before Judge Lineberger's assignments did not, in itself, suggest the new circuit judge had not recused from trying this case." The majority appears to espouse the theory of an implied recusal by Judge Neal at the time of Special Judge Lineberger's appointment because

Judge Neal failed to announce that he was trying the case. That assumption by the majority inspires the question of whether Judge Neal was ever presented with the option of sitting or recusing before Special Judge Lineberger was appointed. The record before us suggests that he was not. That issue is different from the issue of whether Judge Neal later waived his authority by permitting Special Judge Lineberger to proceed with the case. All of this points up the fact that Judge Neal needs to be a party to this original proceeding.

The crux of this case is whether Special Judge Lineberger has already asserted jurisdiction over the matter and, if so, at what point did he do so. For example, did he do so before Respondent Wilson suggested that he disqualify in December 1994? A corollary issue is why did Respondent Wilson not raise the issue of Special Judge Lineberger's lack of authority earlier. Did he waive his rights by not doing so? And, again, does Judge Neal not have a right to be heard in this? After all, it is his authority that is in question.

The majority is undoubtedly right that in certain certiorari cases the trial judge has not been made a party. But this court has also stated most recently that a writ of certiorari is issued to direct a judge to perform a duty. Dougan v. Gray, 318 Ark. 6, 884 S.W.2d 239 (1994). Manifestly, a writ of certiorari issues to prevent a judge from acting in excess of his jurisdiction. Bates v. McNeil, 318 Ark. 764, 888 S.W.2d 642 (1994). This is just such a case. Indeed, the majority has granted the writ, determined that Judge Neal acted in excess of his authority, and vacated his orders without hearing his side of things. That is fundamentally unfair. Judge [**78] Neal is clearly a necessary party under Ark.R.Civ.P. 19. We are on shaky and uncertain ground in my opinion when we remove him from the case without giving him a voice in the matter. I would allow supplemental briefs and advance the case on the docket so that it could be decided in September of this year. The suggestion of a conflict of interest on the part of Judge Neal due to a prior professional relationship with Respondent Wilson has been injected into this matter by Petitioner James Neal. I would allow

an amendment to the petition, should petitioner James Neal choose to do so, and supplemental briefs on this issue also.

Because I would stay the trial, join Judge Neal as a party, permit supplemental briefs, and expedite the matter, I respectfully dissent.

ROAF, J., joins.

ROAF, Justice, dissenting.

There is so much in the majority opinion with which I take issue that it is hard to know where to start, but the holding that Judge John Lineberger was "properly assigned jurisdiction of this case" without any authority or discussion of the inherent underlying conflict between his assignment and the constitutional and statutory authority of the duly elected, sitting circuit judge for the First Judicial District is as good a place as any. The propriety of Judge Lineberger's assignment, and not the refusal of Judge Olly Neal to disqualify is the real issue presently before us, and there is no question that the assignment was made in error.

The majority seems to opine that because this court, through the office of the Chief Justice, had once made a valid assignment of Judge Hanshaw, pursuant to Ark.Code Ann. § 16-10-101(b)(1) (Repl.1994), which grants the Supreme Court general superintending control over the administration of justice in all courts of the state, it retained control over this case regardless of the passage of time and change in circumstances. Indeed, the majority states that it merely would have considered "Judge Neal's willingness to serve in this matter" in making its assignment under Act 496 if respondent had so notified the court. The majority, therefore, does not deem it necessary to discuss the facts surrounding Judge Lineberger's assignment as it relates to the statutory authority of this court to so assign him; I do, and I will.

Judge Lineberger's assignment was apparently triggered by the letter Judge Hanshaw directed to the Administrative Office of the Courts (AOC) on April 20, 1994, in which he expressed

disagreement with this court's reversal of his decision in the initial proceedings between these parties and declined to rehear the case. He asked the AOC to "Please re-assign this case to someone else." Judge Hanshaw's assignment was then terminated by order of this court on April 25, 1994, and Judge Lineberger was assigned to the case by order of this court dated May 3, 1994. The majority construes the initial appointment of Judge Hanshaw on February 18, 1992 and his letter of more than two years later, as some kind of a "record" upon which this court could properly rely in making the reassignment of Judge Lineberger. Indeed, the holding of the majority finds no obligation or responsibility on this court or the AOC other than to react to the "request" of Judge Hanshaw, who has no connection to Phillips County or to the First Judicial District other than his earlier assignment to this case.

We must examine the underlying bases for the authority of both Judge Neal and Judge Lineberger to determine if one will have supremacy over the other. Of course, Judge Neal's authority to hear this case derives from his status as the circuit judge elected by the people of his district. Arkansas Const. art. 7, § 13 provides:

The State shall be divided into convenient circuits, each circuit to be made up of contiguous counties, for each of which circuits a judge shall be elected, who, during his continuance in office, shall reside in and be a conservator of the peace within the circuit for which he shall have been elected.

Further, Ark.Code Ann. § 16-13-903 (Repl.1994) provides that voters of the first judicial district (which includes Phillips County Circuit Court) must elect the judges who preside over all cases arising within the district. Finally, Ark.Code Ann. § 16-13-210 (Repl.1994) provides in part:

Any circuit judge of this state, at any time while mentally and physically competent and physically present in the geographical area of the judicial district which he serves as judge, may hear, adjudicate, or render any appropriate order with respect to, any cause or matter pending in any circuit court over which he presides ...

As to Judge Lineberger's authority, this court has concluded that Ark. Const. art. 7, § 21, providing for the election of special judges, and Ark. Const. art. 7, § 22, permitting circuit judges to temporarily hold court for each other, are the modes expressly set out in the constitution and are exclusive of all other methods of temporarily replacing a circuit judge. Wessell Bros. Drilling Co. v. Crossett Sch. Dist., No. 52, 287 Ark. 415, 701 S.W.2d 99 (1985); Burris, Adm'r v. Britt, Judge, 281 Ark. 225, 663 S.W.2d 715 (1984). Because Judge Lineberger was not elected by the practicing attorneys of Phillips County pursuant to Ark. Const. art. 7, § 21, the only provision under which Judge Lineberger could hold authority to hear the case is Ark. Const. art. 7, § 22. Article 7, § 22, Exchange of circuits, provides:

The judges of the circuit courts may temporarily exchange circuits or hold courts for each other under such regulations as may be prescribed by law.

(Emphasis supplied.) In accordance, Ark.Code Ann. § 16-10-101 provides in part:

(b)(1) Under rules prescribed by the Supreme Court, the Chief Justice may require reports from all courts of the state and may issue such orders and regulations as may be necessary for the efficient operation of those courts to ensure the prompt and proper administration of justice and may assign, reassign, and modify assignments[*183] of judges of the circuit court, the chancery court, and the probate court to hold, upon a temporary basis, regular or special sessions for the transaction of civil or criminal business within any other such court.

(Emphasis supplied.) This court has recognized that if a trial court has problems with congested dockets or conflicts in scheduling, and the prompt and proper administration of justice warrant it, the temporary assignment of judges may be had pursuant to Ark.Code Ann. § 16-10-101 (Repl.1994). (Emphasis supplied.) Arkansas Dep't of Human Services v. Templeton, 298 Ark. 390, 769 S.W.2d 404 (1989); See State v. George, 250 Ark. 968, 470 S.W.2d 593 (1971). Further, where the regular judges of the circuit recuse

from hearing the case, the court may temporarily assign a judge from another circuit. See Burris, supra.

Initially, it may appear that both Judge Neal and Judge Lineberger have authority to hear the matter. In Rowlins v. State, 319 Ark. 323, 891 S.W.2d 56 (1995), this court concluded that Ark. Const. art. 7, § 22 clearly provides that circuit judges may temporarily exchange circuits. The court stated that Ark.Code Ann. § 16-13-403 (Repl.1994) (statutory procedure for exchange) merely implemented that constitutional mandate and did not conflict with Ark.Code Ann. § 16-13-1203 (Repl.1994) which provided the voters of the district must elect the judges who preside over all cases arising within the district. Similarly, § 16-10-101 (authorizing assignment by Chief Justice) merely implements the mandate of art. 7, § 22 and does not, per se, conflict with Ark.Code Ann. §§ 16-13-210 or 16-13-903.

The majority concludes that because Judge Lineberger's assignment was valid and gave him jurisdiction, Judge Neal's "attempt to assume jurisdiction" was clearly erroneous and void. Judge Neal, however, was a duly elected circuit judge for Phillips County, and he had not disqualified from serving on the case. Therefore, there was no basis for assigning another judge to hear a matter which he was capable of presiding over, and, in fact, elected to preside over. In essence, it could be concluded that Judge Neal had already exercised jurisdiction over the matter.

In the instant case, the critical question is whether a judge may be assigned under § 16-10-101 even though there is a regular circuit judge who has not recused and is capable of hearing the matter. This court clearly has the authority to assign judges under § 16-10-101, and the provision does not appear to place limitations upon that power. However, we have limited that authority by stating that if a trial court has problems with congested dockets or conflicts in scheduling, and the prompt and proper administration of justice warrant it, the temporary assignment of judges may be had pursuant to § 16-10-101. Arkansas Dep't of Human Services v. Templeton, 298 Ark. 390, 769 S.W.2d 404 (1989). Thus, it would appear that the trial court must have problems with

congested dockets or conflicts in scheduling before the court may simply assign a judge.

Surely we are not granted unlimited authority to assign a circuit judge. In the instant case, the assignment was probably inadvertent, but the impact is the same. If the assignment of Judge Lineberger is deemed valid, then the court would, in essence, be granted the authority to assign and reassign circuit judges without even a request from the regular sitting judges. This court has stated that the prompt and proper administration of justice must warrant the assignment. Because Judge Neal was capable of hearing the matter, the assignment of Judge Lineberger was not warranted.

Because this court did not have the authority to assign Judge Lineberger, he does not have jurisdiction to hear the matter, or any matter in Phillips County. See Waddle v. Sargent, 313 Ark. 539, 855 S.W.2d 919 (1993). The general rule is that a judgment entered without jurisdiction of the person or the subject matter or in excess of the court's power is void. West v. Belin, 314 Ark. 40, 858 S.W.2d 97 (1993). Further, in Abercrombie v. Green, 235 Ark. 776, 362 S.W.2d 12 (1962), this court recognized that the constitution and statutes require that a special circuit judge or chancellor be elected by the attorneys in attendance in the court and that the [*184] proceedings be entered upon the record. This court stated that where the parties attempt to select a special judge by agreement the proceedings are void. Id. Thus, any proceedings by Judge Lineberger would be void.

I conclude, without reservation, that this court and the AOC should, in every instance, be charged with the responsibility for knowing the status of the duly elected, sitting judges in a district before making any assignment pursuant to § 16-10-101, and it matters not whether the assignment of Judge Lineberger in this case was made inadvertently, by oversight, or with knowledge of the status of Judge Neal; it was made in error and the result is the same--the assignment is void.

Additionally, there is not one document among the voluminous documentation included with the petition, nor is there even an allegation, indicating that the respondent or Judge Olly Neal were ever aware of the assignment of Judge Lineberger, until the order appointing him was filed with the Circuit Clerk of Phillips County on September 14, 1994. The majority goes so far as to even state that the respondent should have been aware of this assignment pursuant to the "duty of a litigant to keep himself informed of the progress of his case." The majority is in essence characterizing the assignment of a circuit judge as somehow part and parcel of the underlying adversarial proceeding; I take issue with this characterization. Further, the issues of Judge Neal's alleged conflict of interest and his refusal to disqualify are not presently before us and are irrelevant; the injection of these issues into the jurisdictional question presented by petitioner serves only to cloud the real issue before us, that of the validity of the assignment of Judge Lineberger in the first place.

Finally, the proper remedy to resolve this conflict is a direct appeal. The settled rule is that when there is a remedy by appeal, a writ of certiorari will not be granted unless there was a want of jurisdiction, or an excess in its jurisdiction, by the court below. Arkansas Dep't of Human Servs. v. Templeton, 298 Ark. 390, 769 S.W.2d 404 (1989). The want of jurisdiction or act in excess of jurisdiction must be apparent on the face of the record. Id. In the instant case, Judge Neal is a regular circuit judge for Phillips County and he heard a matter pending in Phillips County Circuit Court. Thus, it is not apparent on the face of the record that there was a want of jurisdiction or an act in excess of jurisdiction. In Wessell, supra, this court addressed on direct appeal the question of which judge had the authority to act--an assigned judge or a judge elected by attorneys pursuant to art. 7, § 21.

Today's holding stands for the proposition that this court, through the office of the Chief Justice, can make an assignment of a judge foreign to a district upon the most casual and offhanded of requests, or even in the absence of any request at all, without regard to the status of the duly elected judges serving in the county

and district, and such assignment will be a valid exercise of the statutory authority under § 16-10-101, so long as the sitting judge has not actually commenced proceedings on the case. Certainly this court does not contemplate wielding its considerable power in this fashion in the future, and just as certainly it should not do so in this instance. The citizens of the First Judicial District have elected Judge Neal as the circuit judge to hear cases brought forward in Phillips County. To deny his constitutional authority over any proceeding in this unprecedented manner is to impermissibly deprive these citizens of their voice in the election of the judicial officer for their district.

I respectfully dissent.

(FN1.) Judge Olly Neal was elected at the General Election on November 3, 1992.

(FN2.) Section 16-10-101 provides in pertinent part as follows:

> (a) The Arkansas Supreme Court shall have general superintending control over the administration of justice in all courts in the State of Arkansas. The Chief Justice of the Supreme Court shall be directly responsible for the efficient operation of the judicial branch and of its constituent courts and for the expeditious dispatch of litigation therein and the proper conduct of the business of the courts.
>
> (b)(1) Under rules prescribed by the Supreme Court, the Chief Justice may require reports from all courts of the state and may issue such orders and regulations as may be necessary for the efficient operation of those courts to ensure the prompt and proper administration of justice and may assign, reassign, and modify assignments of judges of the circuit court, the chancery court, and the probate court to hold, upon a temporary basis, regular or special sessions

for the transaction of civil or criminal business within any other such court.

(FN3.) The dissent suggests this court's assignment of Judge Lineberger exceeded its powerof temporary appointments under Act 496. Such is not the case. Again, when this court temporarily assigned Judge Lineberger to hear this case, the record showed that such assignment was necessary for the proper administration of justice.

(FN4.) Petitioner suggested Judge Neal's disqualification, citing the Judge's past association with respondent in the practice of law.

APPENDIX 6

WILSON V. NEAL
939 S.W.2d 312, 327 Ark. 783 (Ark. 1997)

Supreme Court of Arkansas.
Jimmie L. WILSON, Appellant,
v.
James A. NEAL, Appellee.
No. 96-1524.
March 24, 1997.

OPINION

PER CURIAM.

Movant Jimmie L. Wilson has filed two motions for an extension of time to file his appellant's brief because of his current service in the Arkansas General Assembly. Wilson also states in his motion dated February 27, 1997, that the supplemental record ordered by this court has not been filed. In returning the writ of certiorari, the Phillips County Circuit Clerk advised this court that no hearing had been scheduled or held in circuit court to settle the record and, thus, no order of the circuit court, giving her directions, had been forthcoming.

Wilson is correct that his legislative service entitles him, as a party to this matter, to a stay of proceedings. The pertinent statute provides a stay for 30 days after adjournment of the legislative session, sine die. Ark.Code Ann. § 16-63-406 (1987). Wilson asks for an extension of time of 45 days in which to file his brief after the legislature adjourns. The request is granted. Counsel for the parties are encouraged to proceed with a hearing to settle the record in this case forthwith. The settled record in this matter shall be filed as soon as is practicable, and Wilson shall file his appellant's brief within 45 days after the General Assembly adjourns.

NEWBERN, GLAZE and CORBIN, JJ., not participating.

APPENDIX 7

WILSON V. NEAL
947 S.W.2d 338, 329 Ark. 125 (Ark. 1997)

Supreme Court of Arkansas.
Jimmie L. WILSON, Appellant/Petitioner,
v.
James A. NEAL, Appellee,
John Plegge, Respondent No. I,
Wanda W. McIntosh, Respondent No. II.
No. 96-1524.
June 16, 1997.

OPINION

LEAD
PER CURIAM.

This petition for writ of mandamus is the outgrowth of our direction to the trial court to settle the record in this appeal. Petitioner Jimmie L. Wilson moves the court for the writ to direct the trial court to include the record in a U.S. District Court cause, Wilson v. Neal, 920 F.Supp. 976, as part of the record in this appeal. Petitioner Wilson claims that without the federal record his record on appeal is inadequate. Petitioner Wilson further challenges the failure of the trial court to include in the record the proceedings before Hon. Lance Hanshaw, Special Circuit Judge; Hon. John Lineberger, Special Circuit Judge; and Hon. Olly Neal, former Circuit Judge.

Respondent Neal answers that he has no objection to supplementing the record in this matter with the Hon. Lance Hanshaw trial (Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994)), which is on file with the Arkansas Supreme Court. Respondent Neal also tenders the transcript of proceedings before the Hon. Olly Neal on May 17, 1995, as a potential supplement to the record in the appeal at hand. He further observes that there is

no record of proceedings before Hon. John Lineberger. Respondent Neal adds that Petitioner Wilson made no request for an extension of time for the preparation of the transcripts for these three proceedings and, indeed, had stated in the notice of appeal for each proceeding that a transcript was being prepared.

The petition for writ of mandamus is denied. This extraordinary writ does not lie for matters that involve the discretion of the trial court. Saunders v. Neuse, 320 Ark. 547, 898 S.W.2d 43 (1995). Here, it is clear that the trial court determined that the federal district court record was not relevant to its decision concerning settlement of the record because it was extraneous to the proceeding before it and to its decision. The trial court did note that supplementing the record with other proceedings was a matter to be decided by the appellate court. We agree.

Writ denied.

NEWBERN, GLAZE and CORBIN, JJ., not participating.

APPENDIX 8

WILSON V. NEAL
964 S.W.2d 199, 332 Ark. 148 (Ark. 1998)

Supreme Court of Arkansas.
Jimmie L. WILSON, Appellant,
v.
James A. NEAL, Appellee.
No. 96-1524.
March 5, 1998.

COUNSEL

George E. Hairston, New York, NY, E. Dion Wilson, Victor Hill, Helena, Roy C. Lewellen, Sam Whitfield, Marianna, for Appellant.

Robert J. Donovan, Marianna, for Appellee.

OPINION

LEAD
IMBER, Justice.

Attorney Jimmie L. Wilson appeals the trial court's order of summary judgment which disbarred him from the practice of law in Arkansas. We reverse and remand for a hearing to determine the appropriate sanction for Wilson's violation of Model Rule of Professional Conduct 8.4(b).

In the words of Chief Judge Waters of the United States District Court, the procedural background of this case is "long and tortured," Neal v. Wilson, 920 F.Supp. 976 (E.D. Ark.1996), and it has been discussed in detail in three other opinions. See Neal v. Wilson, 112 F.3d 351 (8th Cir.1997); Neal v. Wilson, 321 Ark. 70, 900 S.W.2d 177 (1995); Neal v. Wilson, 316 Ark. 588, 873 [**153] S.W.2d 552 (1994). The facts relevant to the issues presented in this appeal are as follows.

In 1981 and 1982, Jimmie L. Wilson borrowed approximately $775,230 from the Farmers Home Administration (FmHA) for farm operating expenses. The loan was secured by an FmHA lien on Wilson's crops. On August 22, 1990, Wilson pled guilty in the United Stated District Court, Eastern District, to three counts of violating 18 U.S.C. § 658 (FN1) by "knowingly" disposing of soybeans and rice that were mortgaged and pledged to the FmHA, and two counts of violating 18 U.S.C. § 641 (FN2) by "knowingly" taking money from a Department of Agriculture bank account and using it for unapproved purposes. For these crimes, Wilson was sentenced to four and one-half months in prison and three years of probation. The United States District Court also suspended Wilson's license to practice law in the federal courts until final disposition of the disciplinary actions taken against him.

On March 29, 1991, the Arkansas Committee on Professional Conduct ("Committee") notified Wilson that a complaint had been filed against him alleging that his misdemeanor convictions in the federal court constituted a violation of the Model Rules of Professional Conduct. Wilson failed to respond either personally or in writing to the merits of the allegations contained in the complaint. On July 22, 1991, the Committee determined by a unanimous vote that Wilson had violated the Model Rules, and on October 9, 1991, the Committee filed a disbarment action against Wilson in the Phillips County Circuit Court.

Over the next five years, numerous pleadings and interlocutory appeals were filed in this case. See Neal v. Wilson, 112 F.3d 351 (8th Cir.1997); Neal v. Wilson, 920 F.Supp. 976 (E.D.Ark.1996); Neal v. Wilson, 321 Ark. 70, 900 S.W.2d 177 (1995); Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994). Finally, on August 30, 1996, the Phillips County Circuit Court entered summary judgment in favor of the Committee. In its order, the court: 1) rejected Wilson's argument that the Committee had denied him due process of law by denying his requests for extensions to respond to the initial complaint; 2) denied Wilson's request for additional discovery; 3) found that Wilson had violated

Model Rule 8.4; and 4) held that disbarment was the appropriate sanction. From this order, Wilson filed a timely notice of appeal.

On appeal, Wilson contends that there were numerous errors and violations of his constitutional rights throughout the disbarment process before the Committee and the trial court. We will address these issues in the order in which they arose.

I. Double Jeopardy and Collateral Estoppel

As previously mentioned, this is the third state appeal in this matter. For his first argument on appeal, Wilson contends that the doctrines of collateral estoppel and double jeopardy should have prevented the Committee from continuing the disbarment action against him. Wilson is procedurally barred from raising these arguments on appeal because they were not raised below or ruled upon by the trial court. Wilson v. Rebsamen Ins. Inc., 330 Ark. 687, 957 S.W.2d 678 (1997); McGhee v. State, 330 Ark. 38, 954 S.W.2d 206 (1997). It is well settled that to preserve arguments for appeal, even constitutional ones, the appellant must obtain a ruling below. Akins v. State, 330 Ark. 228, 955 S.W.2d 483 (1997). Accordingly, we reject this argument without reaching the merits.

II. Requests for Extensions

Next, Wilson contends that the Committee violated his right to procedural due process when it denied his requests for an extension to prepare a response to the initial complaint filed before the Committee. Citing McCullough v. Neal, 314 Ark. 372, 862 S.W.2d 279 (1993), the Committee contends that this issue is procedurally barred because Wilson failed to exhaust his administrative remedies. According to Sections 5(E)(3) and (F)(1) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, an attorney who has been cautioned, reprimanded, or suspended has a right to a de novo hearing before the Committee. In McCullough, we held that an attorney who failed to exercise this administrative remedy was procedurally barred from contesting the Committee's decision on

direct appeal. Id. This case, however, is distinguishable from McCullough, because if the vote is to initiate disbarment proceedings, Section 5(E)(5) declares that the Committee shall file a disbarment action in circuit court and "there shall be no hearing before the committee." Because Wilson did not have any further administrative remedies [*203] before the Committee, as did the attorney in McCullough, we conclude that the issue is not procedurally barred.

Turning to the merits, we have previously explained that the power to regulate and define the practice of law is a prerogative of the judicial department as one of the divisions of government. Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994); Weems v. Supreme Court Comm. on Professional Conduct, 257 Ark. 673, 523 S.W.2d 900 (1975). Moreover, Amendment 28 to the Arkansas Constitution declares that, "[t]he Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." Accordingly, we have promulgated the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys of Law, which state in relevant part that:

(1) Upon receiving information of such complaint, the attorney shall have twenty (20) days in which to file a written response consisting of an original and eight (8) copies with the Executive Director....

(2) The Executive Director is authorized to grant, at the request of an attorney, an extension of reasonable length for the filing of a response. Subsequent requests for extensions must be in written form and will be ruled on by the Chairman of the Committee.

Section 5(C).

[3] On March 29, 1991, the Committee sent Wilson a letter announcing that a complaint had been filed against him. According to Section 5(C)(1), Wilson had twenty days to respond to the complaint. Instead of filing a response, Wilson's attorney

sent a letter to the Committee on April 15, 1991, asking for an extension until August 30, 1991. The Executive Director of the Committee granted Wilson an extension until May 20, 1991. On appeal, Wilson argues that the Committee violated his rights because it granted him an extension for only one month instead of for the three and one-half months that he requested. According to Section 5(C)(2), the Executive Director has the authority to grant the first extension for a "reasonable length" of time. We hold that one month was a reasonable length of time because Wilson already had twenty days to respond, and he was represented by competent counsel who could have helped him prepare his response.

On May 20, 1991, Wilson tendered a second request for an extension which was denied by the Committee Chairman. At this point, the Committee had already given Wilson one extension, thereby allowing him almost two months instead of the usual twenty days to file his response. Accordingly, we also hold that the Committee did not violate Wilson's rights when it denied his second request for an extension.

III. Constitutionality of the Procedures Regulating Professional Conduct

After denying Wilson's two requests for extensions, the Committee determined by a unanimous vote that Wilson's misdemeanor convictions in the federal court constituted a violation of the Model Rules. The Committee then filed a disbarment action against Wilson in the Phillips County Circuit Court pursuant to Section 6(B), which states in relevant part that:

When a complaint against an attorney is based on a conviction of a felony or a crime which also violates Rule 8.4(b) of the Model Rules of Professional Conduct, the Committee shall institute an action of disbarment.

(Emphasis added.)

On appeal, Wilson argues that this rule is unconstitutional because it grants the Committee unfettered discretion to determine

what crimes constitute a violation of Model Rule 8.4(b), and to arbitrarily choose when they will pursue disbarment. We find no merit to either of these arguments because the rule unambiguously proclaims that the Committee "shall" institute a disbarment action when it determines that a crime constitutes a violation of Model Rule 8.4(b). The Committee simply has no discretion on whether or not to file a disbarment action. Moreover, it is the trial court, not the Committee, that ultimately determines whether there has been a violation of the Model Rules, and whether disbarment is the appropriate sanction. Section 5(G)(2). Accordingly,[*204] we also find no merit to Wilson's third point on appeal.

IV. Discovery

After the disbarment action was filed, Wilson propounded interrogatories to the Committee which included a detailed request for information regarding any complaint the Committee had ever received against an attorney who had been convicted of a criminal offense. Wilson contended that he needed this information to develop his disparate-treatment argument. When the information was not forthcoming, Wilson filed a motion to compel, which was denied by the trial court. Wilson claims that the trial court committed reversible error when it rendered this ruling. We disagree.

It is well settled that a trial court has wide discretion in matters pertaining to discovery, and thus we will reverse a trial court's ruling only when there has been an abuse of discretion. Parker v. Southern Farm Bureau Cas. Ins. Co., 326 Ark. 1073, 935 S.W.2d 556 (1996); Stein v. Lukas, 308 Ark. 74, 823 S.W.2d 832 (1992). Moreover, a discovery motion must be considered in light of the particular circumstances which give rise to the request and the need of the movant for the information requested. Parker, supra; Marrow v. State Farm Ins. Co., 264 Ark. 227, 570 S.W.2d 607 (1978).

We hold that the trial court did not abuse its discretion when it denied Wilson's motion to compel for several reasons. First, the majority of the information that Wilson requested was a

matter of public record which he could have easily obtained from the Arkansas Supreme Court Clerk pursuant to Section 4(C), which declares that:

> When a letter of caution, reprimand, or suspension becomes final under these Procedures, or when the Committee decides to initiate disbarment proceedings, a copy of such shall be forwarded to the Clerk and shall be maintained as a public record by the Clerk.

Second, during the hearing on Wilson's motion to compel, the Executive Director of the Committee voluntarily took the stand and answered many of Wilson's questions about other attorneys who had been convicted of criminal offenses. The Committee also presented its files, which were reviewed in camera by the trial court. After reviewing the materials, the court determined that the Committee had adequately complied with Wilson's request.

Finally, the court found that Wilson had been given ample opportunity over the five years that this case was pending to engage in meaningful discovery, but that he had been "less than diligent." Based on these circumstances, we cannot say that the trial court abused its discretion when it denied Wilson's motion to compel. Accordingly, we also affirm on this point.

V. Violation of Model Rule 8.4(b)

The first issue the trial court had to resolve in the disbarment action was whether Wilson's misdemeanor convictions constituted a violation of Model Rule 8.4(b). Model Rule 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." In his defense, Wilson argued that his misdemeanor convictions did not constitute a violation of this rule because he did not commit the crimes with a culpable mens rea. We hold that the trial court properly rejected this argument for two reasons.

First, both crimes to which Wilson pled guilty required knowing conduct. See 18 U.S.C. §§ 641 and 658. Wilson pled

guilty to three charges that he knowingly disposed or converted to his own use crops pledged to the FmHA, and to two charges that he knowingly took money from a controlled Department of Agriculture bank account and used the money for unapproved purposes. Second, Section 6(B) declares that a certified copy of the judgment of conviction "shall be conclusive evidence of the attorney's guilt" of the underlying crime, and that the attorney may not "offer evidence inconsistent with the essential elements of the crime for which he was convicted." Thus, once Wilson was convicted in federal court, he was precluded from relitigating the elements[*205] of the crimes during the disbarment proceeding.

After considering the arguments by both sides, the trial court entered summary judgment in favor of the Committee. As we have said on numerous occasions, a trial court may grant summary judgment pursuant to Ark. R. Civ. P. 56 if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Wilson v. Rebsamen Ins. Inc., 330 Ark. 687, 957 S.W.2d 678 (1997); Sanders v. Bradley County Human Serv. Pub. Facilities Board, 330 Ark. 675, 956 S.W.2d 187 (1997). In making this determination, we review the evidence in the light most favorable to Wilson, as the party resisting the motion, and resolve all doubts and inferences in his favor. Wilson, supra; Sanders, supra. In this case, the trial court concluded that the "law of the case" and the "undisputed facts" required a determination that Wilson's misdemeanor convictions constituted a violation of Model Rule 8.4(b). These rulings will be considered separately.

We hold that the trial court erred when it concluded that the law-of-the-case doctrine prevented it from deciding whether Wilson violated Model Rule 8.4(b). The law-of-the-case doctrine precludes a trial court from reconsidering questions that were "explicitly or implicitly" determined on appeal. Foreman v. State, 328 Ark. 583, 945 S.W.2d 926 (1997). In Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994), Wilson's first appeal in this case, one of the issues on appeal was whether the [**160] Model Rules were applicable because they were adopted after Wilson committed the federal crimes, but before he was convicted. We

held that the Model Rules applied because the relevant date was the day Wilson was convicted and not the days on which the crimes were committed. Id. In making this determination we said:

> Rule 8.4(b), which defines "professional misconduct" in part as the commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," and which comprehends the misdemeanor charges to which Mr. Wilson pled guilty, was effective as part of the Model Rules of Professional Conduct on January 1, 1986, having been adopted by per curiam order on December 16, 1985.

Id. With this language, we were merely clarifying our holding that the Model Rules applied to Wilson's federal convictions. We were not, however, either "explicitly or implicitly" making a factual conclusion that Wilson's conduct constituted a violation of Model Rule 8.4. In fact, later in the opinion we specifically denied the Committee's request to pronounce judgment on this issue because the trial court had not ruled on the matter. Id. Accordingly, we conclude that the trial court erred when it found that the law of the case mandated summary judgment in favor of the Committee.

This, however, does not end our inquiry because the trial court also found that "the undisputed facts" established that Wilson's federal convictions constituted a violation of Model Rule 8.4(b). We agree. According to Model Rule 8.4(b), it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The Comments to Rule 8.4 further explain that:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return.... Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving

[**161] violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category.

(Emphasis added.)

In this case, Wilson was convicted of five counts of "knowingly" converting money and property that belonged to the federal government in violation of 18 U.S.C. §§ 641 and 658. Although all five crimes were misdemeanors, we agree with the trial court that these convictions involved dishonesty and a breach of trust, and seriously undermined "the confidence of the public in our legal profession." See In re Lee, 305 Ark. 196, 806 S.W.2d 382 (1991). Because we have no hesitation in holding that Wilson's convictions reflected adversely on Wilson's fitness to practice law, we affirm the trial court's finding that Wilson violated Model Rule 8.4(b).

VI. Right to A Full Trial

Next, Wilson argues that by entering summary judgment on this issue, the trial court denied him a right to an "action" and a "trial" under Section 5(G)(1), which states that:

An action for disbarment shall be filed with the Clerk of the Circuit Court of the county in which the attorney resides, or in which the alleged violation was committed. In disbarment suits, the action shall proceed as an action between the Executive Director and the respondent. Proceedings in the Circuit Court shall be held in compliance with the Arkansas Rules of Civil Procedure and trial shall be had before the Circuit Judge without a jury.

Wilson somehow construes this section to give him an absolute right to a full trial and thus precludes the entry of summary judgment. We disagree. According to Section 5(G)(1), the Rules of Civil Procedure, including Ark. R. Civ. P. 56 on summary judgments, apply once the Committee files a disbarment action in the circuit court. Because summary judgment was appropriate in this case for the reasons explained above, we hold that the trial court was not required to hold a full trial.

VII. Appropriate Sanction

Once the trial court concluded that Wilson's federal convictions constituted a violation of Model Rule 8.4(b), the next step was to determine the appropriate sanction. It is in this final stage of the disbarment proceeding that we find reversible error.

In its order of summary judgment, the trial court incorrectly found that Wilson "must be disbarred as a matter of law" according to Section 6(B), which provides that:

When a complaint against an attorney is based on a conviction of a felony or a crime which also violates Rule 8.4 b) of the Model Rules of Professional Conduct, the Committee shall institute an action of disbarment.

(Emphasis added.) We disagree with the trial court's reasoning because this section declares what type of action the Committee must file and does not limit the sanctions the court may impose. Instead, we hold that the correct provision is Section 5(G)(2), which provides in relevant part that:

If the Circuit Judge finds that the attorney has violated the Model Rules, he shall caution, reprimand, suspend, or disbar such attorney as the evidence may warrant.

(Emphasis added). It is clear from this provision that the trial court was not required to disbar Wilson, but was entitled to select any one of the four listed sanctions. Accordingly, we hold that the trial court erred when it concluded that disbarment was required as a matter of law.

Again, this does not end our analysis because the trial court also declared in its order of summary judgment that "even if this conclusion were not reached as a matter of law, this Court's conclusion would be the same, based upon the undisputed facts." We cannot agree because the trial court reached this conclusion without all the information necessary to make a decision on the appropriate sanction.

During the hearing on the Committee's motion for summary judgment, the trial court assured Wilson that if it concluded that he had violated Rule 8.4, it would hold a second hearing to determine the appropriate sanction. The trial court, however, never held the second hearing as promised, and instead ordered disbarment before Wilson was ever provided an opportunity to present evidence in mitigation. Clearly, at this point in the disbarment proceeding, Wilson should not have been allowed to relitigate the elements of the underlying crimes, or whether his convictions constituted a violation of Model Rule 8.4(b). Both parties, however, should have been able to present some evidence and arguments as to which of the four sanctions was appropriate in this case.

The American Bar Association Joint Committee on Professional Standards has developed[*207] the following list of aggravating and mitigating factors that we think are useful in a court's determination of an appropriate sanction:

Aggravating Factors:
(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with [the] rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge [the] wrongful nature of [the] conduct;
(h) vulnerability of [the] victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution;
(k) illegal conduct, including that involving the use of controlled substances.

Mitigating Factors:
(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify [the] consequences of [the] misconduct;

(e) full and free disclosure to [the] disciplinary board or cooperative attitude towards [the] proceedings;

(f) inexperience in the practice of law;

(g) character or reputation;

(h) physical disability;

(i) mental disability or chemical dependency including alcoholism or drug abuse when;

(1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;

(2) the chemical dependency or mental disability caused the misconduct;

(3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

j) delay in [the] disciplinary proceedings;

k) impositions of other penalties or sanctions;

l) remorse;

m) remoteness of prior offenses.

Model Standards for Imposing Lawyer Sanctions §§ 9.22 and 9.32 (1992).

For these reasons, we affirm the trial court on the first six issues and reverse only on the final issue of sanctions. We remand for a sanction hearing during which each side may present evidence and arguments regarding the above-listed aggravating and mitigating factors. The parties, however, must limit their arguments to these matters, and for the reasons explained above, are precluded from relitigating the elements of underlying federal crimes, or whether those convictions constituted a violation of the Model Rules.

Affirmed in part and reversed and remanded in part for proceedings consistent with this opinion.

GENE E. McKISSIC, CHARLES D. BARNETTE and JACK T. LASSITER, Special Justices, join in this opinion.

NEWBERN, GLAZE and CORBIN, JJ., not participating.

(FN1.) This statute says in relevant part that:

> Whoever, with intent to defraud, knowingly conceals, removes, disposes of, or converts to his own use or to that of another, any property mortgaged or pledged to, or held by, ... the Secretary of Agriculture acting through the Farmers Home Administration ... shall be fined under this title or imprisoned ... or both....

(FN2.) This statute says in relevant part that:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or any department or agency thereof, ... shall be fined under this title or imprisoned ... or both....

APPENDIX 9

PROCEDURES OF THE COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW

SECTION.	SECTION.
1. Scope	5. Procedure
2. Committee	6. Criminal Activity.
3. Executive director	7. Sanctions.
4. Confidentiality/Records.	8. [Deleted].

SECTION 1.

SCOPE

A. PURPOSE. These Procedures are promulgated for the purposes of regulating the professional conduct of attorneys at law and shall apply to all complaints within the purview of the Model Rules of Professional Conduct or any former rules adopted by the Arkansas Supreme Court filed against attorneys after the effective date of these Procedures. Every attorney now or hereafter licensed to practice law in the State of Arkansas shall be a member of the Bar of this State and subject to these Procedures. The jurisdiction of the Supreme Court Committee on Professional Conduct shall extend to lawyers in inactive or suspended status.

* * *

SECTION 5.

PROCEDURE

A. GENERAL. The Committee shall investigate and adjudicate all complaints alleging violation of the Model Rules that may be brought to its attention in the form of an affidavit, or in respect of which any member of the Committee may have information, and shall give the attorney involved an opportunity to explain or refute

the charge. The Committee shall accept and treat as a formal complaint any writing signed by a judge of a court of record in this State regardless of whether such signature is verified.

* * *

G. ACTIONS FOR DISBARMENT. (1) An action for disbarment shall be filed with the Clerk of the Circuit Court of the county in which the attorney resides, or in which the alleged violation was committed. In disbarment suits, the action shall proceed as an action between the Executive Director and the respondent. Proceedings in the Circuit Court shall be held in compliance with the Arkansas Rules of Civil Procedure and trial shall be had before the Circuit Judge without a jury.

(2) If the Circuit Judge finds that the attorney has violated the Model Rules, he shall caution, reprimand, suspend or disbar such attorney as the evidence may warrant. If the Judge finds that the complaint of the Committee is not sustained by the evidence, the proceedings shall be dismissed.

* * *

SECTION 7.

SANCTIONS

A. SANCTIONS AUTHORIZED. When the Committee finds that an attorney has violated any provisions of the Model Rules, the Committee is authorized:

(1) To warn (which shall be confidential); or

(2) To issue letters of caution or reprimand; or

(3) To suspend the attorney for a period up to but not exceeding one (1) year; or

(4) To cause a complaint to be prepared and filed with the Circuit Court of proper venue in accordance with the manner provided for disbarment actions in subsequent G of Section 5 of these Procedures; or

(5) To refer matters to the Committee on Unauthorized Practice, the Client Security Fund Committee, the Committee on Judicial Conduct and corresponding lawyer disciplinary authority in other jurisdictions; or

(6) To take other action as authorized by these Procedures.

* * *

Supreme Court, U.S.
FILED
FEB 5 2001
OFFICE OF THE CLERK

(2)
No. 00-947

IN THE
Supreme Court of the United States

J. L. WILSON,

Petitioner,

v.

JAMES NEAL, DIRECTOR OF THE ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

BRIEF IN OPPOSITION

LYNN WILLIAMS
STAFF LITIGATION ATTORNEY
ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
Justice Building - Room 110
625 Marshall Street
Little Rock, AR 72201
(501) 376-0313

ROBERT J. DONOVAN
Counsel of Record
DAGGETT, VAN DOVER, DONOVAN & PERRY, PLLC
P.O. Box 646
12 South Poplar Street
Marianna, AR 72360
(870) 295-3434

Attorneys for Respondent

164788
Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Are the constitutional rights of the petitioner (and all similarly situated citizen attorneys) to enjoy the federally guaranteed protections of due process and the equal protection of the laws being denied, when the Arkansas Supreme Court or the lower state's courts (in an attorney disciplinary proceeding) are allowed by the system adopted by the state court to exercise unfettered and unlimited discretion in fashioning a sanction of "suspension" of the attorney's license to practice law (in a disbarment proceeding), when the period of such sanction of "suspension" exceeds the limitation of the period of years that the Arkansas Supreme Court's published Procedures for Regulating the Professional Conduct of Attorneys at Law imposes upon the power and authority the Arkansas Supreme Court's Committee on Professional Conduct to impose such sanction, when the court is disciplining such attorneys?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Cited Authorities iv

Table of Appendices vi

Statement of the Case 1

1. Criminal Proceedings. 1

2. Disciplinary Proceeding. 3

A. First Circuit Court Ruling. 4

B. Second Circuit Court Ruling. 5

C. Federal Court Removal and Rulings. .. 5

D. Third Circuit Court Ruling. 8

I. Double Jeopardy and Collateral Estoppel. 8

II. Request for Extensions. 8

III. Constitutionality of the procedures regulating professional conduct. 9

IV. Discovery. 9

Contents

Page

V. Violation of Model Rule 8.4(b). . 10

VI. Right to a Full Trial. 10

VII. Appropriate Sanction. 10

E. Fourth Circuit Court Ruling. 11

Reasons for Denying the Writ 11

Argument 12

A. Consolidated argument of Points raised in Paragraphs A, C, D & E. 13

B. Rulings By Arkansas' Courts in Similar Attorney Disciplinary Matters Have Not Reached Disparate Results. 24

1. A comparison of the Wilson and Matthews proceeding. 24

2. A comparison of the Meurer and Hollingsworth proceedings. 25

Perceived Misstatements Of Fact Or Law In The Petition Bearing On What Issues Properly Would Be Before The Court 27

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) 3

In re Hollingsworth, 339 Ark. __, 4 S.W.3d 492 (1999) 27

In re Louis Art Doddrill, 260 Ark. 223, 538 S.W.2d 549 (1976) 18, 19, 24

In re Meurer, 338 Ark. 601, 999 S.W.2d 196 (1999) 26, 29

In re Meurer, 341 Ark. __, 23 S.W.3d 220 (2000) 26

Matter of Procedures of Arkansas Supreme Court, 792 S.W.2d 323 (Ark. 1990) 11, 13

Neal v. Hollingsworth, 338 Ark. 251, 992 S.W.2d 771 (1999) 26

Neal v. Matthews, 342 Ark. 566, 30 S.W.3d 92 (2000) 24

United States v. Wilson, 806 F.2d 171 (8th Cir. 1986) 1

Cited Authorities

Page

United States Constitution:

Fourteenth Amendment 27

Arkansas Constitution, Amendment 28 ..... 13, 29

Statutes:

18 U.S.C. § 215 24

18 U.S.C. § 558 ..... 3, 27

18 U.S.C. § 641 ..... 3, 25, 27

18 U.S.C. § 658 25

Rules:

Model Rule 8.4(b) 9, 10

Procedural Rule 4(c) 9

Procedural Rules, § B(6) 10

Supreme Court Rules of Professional Conduct, § 5(g)(1) 10

TABLE OF APPENDICES

Page

Appendix A — Findings And Consent Order Of Discipline Of The Supreme Court Committee On Professional Conduct *In re Robert Fuller Meurer*, CPC Docket No. 98-057 Dated February 8, 1999 And Filed February 12, 1999 ..... 1a

Appendix B — Findings And Order Of The Supreme Court Committee On Professional Conduct *In re Robert Fuller Meurer*, CPC Docket No. 99-065 Dated September 29, 1999 And Filed October 22, 1999 ..... 7a

Appendix C — Findings And Order Of The Supreme Court Committee On Professional Conduct *In re Robert Fuller Meurer*, CPC Docket No. 99-071 Dated September 29, 1999 And Filed October 22, 1999 ..... 10a

Appendix D — Memorandum Opinion And Order Of Remand And Judgment Of The United States District Court For The Eastern District Of Arkansas, Western Division Dated March 18, 1996 ..... 13a

Appendix E — Opinion Of The United States Court Of Appeals For The Eighth Circuit Dated And Decided April 25, 1997 ..... 48a

STATEMENT OF THE CASE

The petition and argument includes a lengthy, unnecessary and sometimes inaccurate review of the history of this disciplinary action which requires a response to the facts alleged.

1. Criminal Proceedings:

The facts leading to the within proceeding are found in *United States v. Wilson*, 806 F.2d 171 (8th Cir. 1986) as follows:

> Defendant practices law and operates a farm in Helena, Arkansas. Between February 1980 and April 1982 he borrowed approximately $775,230.00 from the FmHA for farm operating expenses with the loans primarily secured by an FmHA lien on his crops. To insure compliance with the security agreement entered into at the time of the loans, the FmHA circulated defendant's name on a list of FmHA borrowers to the grain dryers in the region of his farm. The grain dryers would then properly issue checks to defendant and the FmHA as co-payees as payment for crops transported from the farm.
>
> Between 1981 and December 1982, defendant made multiple sales of grain in the names of Willie Weaver and Reggie Wilson. Willie Weaver, defendant's cousin and co-defendant below, worked as a farm manager for defendant. Reggie Wilson is defendant's son and is a student, not engaged in farming. The government presented

> evidence that the proceeds from the sales made by Weaver and the junior Wilson, which were issued clear of the FmHA lien, went variously into defendant's law firm account, to cash, into his farm expense account, or toward payment on a bill for farm supplies.
>
> In May 1981, the FmHA required that a supervised joint bank account be established in the names of the FmHA and defendant and his wife, Henrietta. FmHA loan proceeds were to be deposited into the joint account, and defendant was required to advise the FmHA of his intended use of funds prior to the time of any withdrawal. On various occasions, defendant would apply to the FmHA to have funds transferred from the joint account to his farm operating account from which he would retransfer the money to his law firm account. A substantial portion of funds was used for the purchase and maintenance of a Mercedes Benz.

The court in its opinion further stated:

> Defendant-appellant Jimmie L. Wilson appeals from a final judgment entered in district court upon a jury verdict finding him guilty of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, of forty counts of knowingly disposing of property mortgaged to a government agency, in violation of 18 U.S.C. § 658 and of seven counts of unlawfully converting to his own use money of the United States, in violation of 18 U.S.C. § 641.

The above conviction was initially affirmed by the Eighth Circuit Court of Appeals but was reversed in a subsequent appeal when the Eighth Circuit found a *Batson* violation and vacated its previous affirmance. While awaiting re-trial a plea bargain was reached between the petitioner and the United States and the petitioner pled guilty to five (5) misdemeanor counts under 18 U.S.C. § 558 and 18 U.S.C. § 641. The misdemeanor counts were not modified as asserted by the petitioner.

2. Disciplinary Proceeding. While serving his sentence petitioner was notified by certified mail that a complaint had been filed with the committee pursuant to the Model Rules of Professional Conduct as amended and the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, a copy of which was enclosed with the letter. The letter further states that the complaint "is predicated on your entry of a plea of guilty to certain criminal offenses." Copies of appropriate documents concerning the underlying proceedings were attached to the letter. The letter called petitioner's attention to Section 5 of the court's procedures and notified the petitioner that he had twenty (20) days to respond "in affidavit form." Petitioner was further notified that the affidavit, along with the complaint and any supporting documents, would be sent to the committee for vote by written ballot. On April 19, 1991, the Committee, acting through its executive director, acknowledged receipt of an attorney's letter of representation dated April 15, 1991 from petitioner's attorney, requesting an extension of time until August 30, 1991. The director responded by stating the request exceeded the director's authority but an extension of time for submission of petitioner's affidavit of response was granted until May 20, 1991. The director sent a second letter to petitioner's attorney

dated June 10, 1991, acknowledging a subsequent request for extension of time received on May 20, the date the first extension was to expire. The director further advised that the committee chairman had been contacted and that the request for additional time was denied. Petitioner's attorney was advised that the complaint was being processed for a determination pursuant to procedures outlined in the letter. In a letter dated July 22, 1991, the petitioner was notified of the committee's decision to institute disbarment proceedings "resulting from your entry of a plea of guilty to certain criminal offenses." By letter dated July 24, 1991, petitioner's attorney notified the committee that petitioner disagreed with the decision and refused to voluntarily surrender his license. This disciplinary action was commenced on October 9, 1991, by the filing of a complaint against the petitioner in the Circuit Court of Phillips County, Arkansas.

A. First Circuit Court Ruling. In the first Circuit Court ruling the trial court concluded that the Committee chose to wait too long to bring its action and granted the defendant's motion to dismiss. In reversing the trial court the Arkansas Supreme Court stated that the operative procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys "focused upon the fact of conviction rather than the allegation of misconduct." The court then calculated the time from petitioner's plea of guilty on March 22, 1990, to the Committee's action of disbarment filed on October 9, 1991, and held that the action was not time barred. The court also stated that it was the conviction or guilty plea that triggered the mandatory disbarment action against an attorney. The court further noted that any deferment of action until conviction inured to petitioner's benefit since he was "permitted to continue his practice of law in the state courts while his case meandered in its course

for some ten (10) years of trial, appeal, and re-hearings in the federal system." The case was then remanded for further proceedings. *Neal v Wilson,* 873 S.W.2d 552, 16 Ark. 588 (1994) Judge Hanshaw who had heard the first case by assignment asked to be relieved and the case was re-assigned to Judge Lineberger.

B. Second Circuit Court Ruling; and

C. Federal Court Removal and Rulings.

The above proceedings are discussed jointly because of overlapping issues discussed in the opinions.

Perhaps the most objective analysis of the 2nd state circuit court ruling is found in the opinions of United States District Court and the Eighth Circuit Court of Appeals. In *Neal v. Wilson*, 920 F. Supp. 976 (1990) the court stated in its opinion as follows:

> Prior to that time, as a result of a settlement reached in a Federal voting rights case, new electorial sub-districts were created providing for a majority of black voters in some electorial sub-districts, including the one in which the Helena, Arkansas, area is located. Mr. Olly Neal, an African American, was elected to that judgeship. In spite of the fact that the case was clearly assigned to Judge Lineberger and that Judge Linberger had declined to recuse and have the case re-assigned to Judge Neal, Judge Neal attempted to assume jurisdiction and set a hearing for May 18, 1995. The committee, through its attorney, Mr. Donovan, appeared on that date and contested

> Judge Neal's jurisdiction to proceed. Judge Neal ruled that he did have jurisdiction to proceed in the case and decided it on its merits.
>
> (FN 5) The committee contends that Judge Neal was disqualified from hearing the case because he was a law partner of Mr. Wilson until sometime in 1988 and, in fact, was one of the attorneys representing him in the very criminal proceeding which this disbarment proceeding is all about. It is contended that he, in fact, received, either on behalf of himself or in behalf of a client, some of the funds that were wrongfully obtained by Mr. Neal (sic) from the Farmers Home Administration, and that he, by stipulation, testified by letter in the criminal trial.

In affirming the district court the Court of Appeals in *Neal v. Wilson*, 112 F.3d 351 (8th Cir. 1997) stated:

> Wilson moved for Judge Lineberger's disqualification on the basis that there was a new Circuit Judge in Phillips County who had not recused himself who should hear the case. That judge was Olly Neal, an African American who had been elected in 1992 in a minority-majority district, newly created pursuant to a consent decree in a voting rights act lawsuit. Mr. Neal was Wilson's former law partner and one of the attorneys who represented Wilson in his criminal case. Neal also testified at Wilson's federal trial.
>
> Judge Lineberger denied the disqualification motion on January 5, 1995, and set a trial date of June 13, 1995. At Wilson's instigation, a hearing was set

> before Judge Neal. Following the hearing, Judge Neal ruled on May 24, 1995, that he had jurisdiction. He then decided the case on the merits, concluding that Wilson's conduct warranted only a letter of reprimand. The committee sought a Writ of Certiorari from the Arkansas Supreme Court. The Supreme Court issued the writ on June 12, 1995, ruling that Judge Neal did not have jurisdiction and quashing Judge Neal's orders. See *Neal v. Wilson*, 321 Ark. 70, 900 S.W.2d 177 (1995).

The Eighth Circuit also stated in its opinion as follows:

> Wilson argues that the state authorities have acted in bad faith by seeking a reversal of two circuit court decisions favorable to Wilson and that the conduct of the state authorities and the Arkansas Supreme Court shows that Wilson's federal rights will not be honored in state court. *** We agree with the district court that Wilson has proffered no evidence of bad faith, harassment, or other circumstances that might render abstention inappropriate. The Arkansas Supreme Court reversed the two previous Circuit Court rulings on state law grounds, and Wilson has the opportunity in the current state proceeding to raise his federal claims. As we noted above, the district court characterized Wilson's contentions of bad faith by the defendants as "little more than a belief by him that, since the state actors disagree with him and his lawyers, they must have racially discriminatory motives."

The case was then returned to the state trial court and a new judge was assigned when Judge Lineberger recused. The case was then presented to the trial court a third time.

D. Third Circuit Court Ruling.

In *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998), the Supreme Court affirmed the trial court on the first six issues and reversed only on the final issue of sanctions. The issues presented are as follows:

> **I. Double Jeopardy and Collateral Estoppel.** The Court held that petitioner was procedurally barred from raising these arguments on appeal because they were not raised below or ruled upon by the trial court.
>
> **II. Request for Extensions.** Here petitioner contended that the committee violated his right to procedural due process when it denied his request for an extension to prepare a response to the initial complaint filed before the Committee. In its opinion the court noted that the petitioner had twenty (20) days to file a written response and that instead of filing a response Wilson's attorney asked for an extension of time which was granted in part. The Court held that a one month extension was reasonable because petitioner had already had twenty (20) days to respond and was represented by competent counsel who could have helped him prepare his response. The Court also held that a denial of a second request for extension did not violate petitioner's rights because he had already been allowed almost two months instead of the usual twenty (20) days to file his response.

III. Constitutionality of the procedures regulating professional conduct. Petitioner argued that the rules are unconstitutional because the committee had discretion to determine what crimes constitute a violation of Model Rule 8.4(b) and to arbitrarily choose when they will pursue disbarment. The Court found no merit in these arguments because the rules "unambiguously proclaims" that the committee "shall" institute a disbarment action when it determines that a crime constitutes a violation of Model Rule 8.4(b). The Court noted that the committee had no discretion whether or not to file a disbarment action and that it was ultimately the trial court that determined whether there had been a violation of the model rules and whether disbarment was an appropriate sanction.

IV. Discovery. The Court held that the majority of the information requested by petitioner in his discovery was a matter of public record that could easily have been obtained from the Arkansas Supreme Court Clerk pursuant to Rule 4(c) of the Procedural Rules. The Court also noted that on hearing petitioner's motion to compel the executive director of the committee voluntarily took the stand and answered many of Wilson's questions about other attorneys who had been convicted of criminal offenses. The Court also noted that the Committee had presented its files which were reviewed in camera by the trial court. The Court also noted that the trial court's finding that petitioner had over five years to engage in meaningful discovery and that he had been "less than diligent."

V. Violation of Model Rule 8.4(b). The Arkansas Supreme Court found that the trial court erred that it found that the law of the case mandated summary judgment in favor of the committee. However the Supreme Court found as a matter of law that the "undisputed facts" established that petitioner's federal convictions constituted a violation of Model Rule 8.4(b). The court noted that it had no hesitancy in holding that the convictions reflected adversely on petitioner's fitness to practice law.

VI. Right to a Full Trial. The Arkansas Supreme Court held that the language in Section 5(g)(1) of the rules did not guarantee the petitioner an absolute right to a full trial that precluded the entry of summary judgment.

VII. Appropriate Sanction. The Supreme Court held that the trial court erred in its finding that petitioner "must be disbarred as a matter of law" according to Section B(6) of the procedural rules. The court stated that the rules did not "limit the sanctions the court may impose." On remand the court specifically directed that the parties should be able to present evidence and arguments on which of the four sanctions were appropriate in the case. The court also specifically listed the elements published by the American Bar Association Joint Committee on Professional Standards as the aggravating and mitigating factors to be considered.

E. Fourth Circuit Court Ruling. On remand the Circuit Court conducted a "Sanctions" hearing to consider aggravating and mitigating factors. After a hearing the Circuit Court suspended petitioner's license for five (5) years giving credit for previous suspension time. Petitioner again appealed and the Arkansas Supreme Court could not reach a consensus opinion on the core issue of the proper sanctions. Thus the five year suspension was affirmed.

REASONS FOR DENYING THE WRIT

The only question actually presented by the petition is whether the Arkansas Supreme Court rules governing professional conduct of attorneys meets constitutional standards as written and applied.

The Arkansas Supreme Court rules regulating the professional conduct of attorneys are reported as *Matter of Procedures of Arkansas Supreme Court*, 792 S.W.2d 323 (Ark. 1990). These rules meet constitutional standards as written and interpreted by the Arkansas Supreme Court and the federal courts.

Plainly stated, the Arkansas rules authorize the Committee on Professional Conduct to warn, reprimand, or suspend attorneys up to one (1) year for a violation of the model rules. When the Committee finds that disbarment may be warranted, it must cause a complaint to be filed in the Circuit Court which has jurisdiction to warn, reprimand, suspend, disbar or dismiss "as the evidence may warrant." In this case the trial court suspended petitioner for five years and the petitioner asserts that his constitutional rights were violated arguing that the rules limit the circuit court's jurisdiction to suspend to one year and any other

interpretation gives "unfettered and unlimited discretion" in imposing sanctions. Petitioner argues that such discretion violates constitutionally protected rights as written and applied.

Petitioner also alleges racial discrimination based upon his perception of other cases. This issue was not presented to the Arkansas Supreme Court. Nevertheless respondent will demonstrate that the facts do not support petitioner's allegation.

ARGUMENT

In general, the petitioner contends that the *Procedures of the Arkansas Supreme Court Committee on Professional Conduct* ("Procedures") limits the suspension of an attorney's license to one year and that the imposition of a five year suspension of his license was the result of "unfettered and unlimited discretion by Arkansas Judges and Justices in fashioning sanctions" thereby violating his constitutional rights of due process and equal protection. The petition also contains allegations of racial discrimination. The petitioner in his brief divides his argument into the following five categories:

> A. The exercise of absolute discretion results in an unconstitutional outcome; (Pg. 11)
>
> B. Rulings by Arkansas Courts in similar attorney discipline matter have reached disparate results; (Pg. 15)
>
> C. The comity usually accorded by this court to state court attorney discipline proceedings is not

to be a bar to the court's need to review the judgment involved here; (Pg. 20)

D. This court must review the petitioner's federal constitutional claims, because the Arkansas court has refused to do so; (Pg. 23)

E. The rules of construction for state court disciplinary rules and procedures must be governed by federal constitutional standards. (Pg. 25)

Four of the above five points relied upon in the petition involve the interpretation of the Procedures of the Arkansas Supreme Court Committee Regulating Professional Conduct of Attorneys and will be consolidated in respondent's argument. These rules are sometimes referred to by the Arkansas Supreme Court as ("Procedures").

A. Consolidated argument of Points raised in Paragraphs A, C, D & E:

The Arkansas Court is granted authority to regulate the practice of law by Amendment 28 to the Arkansas Constitution which simply states: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." Pursuant to this constitutional authority the Arkansas Supreme Court has enacted the "Procedures" which have been amended from time to time. The "Procedures" governing this petition were enacted by the Arkansas Supreme Court in 1990. The full text of these "Procedures" are published under the title *Matter of Procedures of Ark. Supreme Ct.*, 792 S.W.2d 323.

The portions of the "Procedures" relevant to this proceeding are as follows:

PROCEDURES OF THE COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW

SECTION.	SECTION.
1. Scope	5. Procedure
2. Committee	6. Criminal Activity.
3. Executive Director	7. Sanctions.
4. Confidentiality/Records	8. [Deleted].

SECTION 5.
PROCEDURE

B. NOTICE OF ATTORNEY. At the direction of the Committee or upon a determination by the Executive Director that a complaint should be processed as a formal complaint, the Executive Director shall:

(1) Furnish to the attorney complained against a copy of the formal complaint and advise the attorney that he may file a written response in affidavit form with any supporting evidence desired. The attorney's mailing address on record with the clerk shall constitute the address for service. Certified mailing of the formal complaint to said address shall be deemed service on the attorney.

(2) Advise the attorney that should the attorney be dissatisfied with the ballot vote, the attorney shall have the right to a subsequent hearing.

C. TIME FOR RESPONSE. (1) Upon receiving information of such complaint, the attorney shall have twenty (20) days in which to file a written response consisting of an original and eight (8) copies with the Executive Director. In the event that the Executive Director has not received a response within twenty (20) days following the date of the last notice of attempted delivery by the U. S. Postal Service, the Executive Director shall proceed to issue ballots as provided in subsection D of this Section.

(2) The Executive Director is authorized to grant, at the request of an attorney, an extension of reasonable length for the filing of a response. Subsequent requests for extensions must be in written form and will be ruled on by the Chairman of the Committee.

* * *

D. VOTE BY BALLOT. (1) At such time as the Executive Director has received from the attorney a written response or the attorney has failed to respond within the period provided in subsection C of this Section, the Executive Director shall assign the case a docket control number and shall cause to be prepared seven copies of the complainant's affidavit, the response, rebuttal and exhibits, if any, and such other information, memoranda, and recommendations which the Executive Director may

deem relevant and shall send a copy thereof to each member of the Committee.

* * *

E. RESULTS OF BALLOT VOTE.

(5) If a majority of the Committee votes by paper ballot to initiate disbarment proceedings, the Committee shall proceed as set out in subsection G of this Section and there shall be no hearing before the Committee.

G. ACTIONS FOR DISBARMENT. (1) An action for disbarment shall be filed with the Clerk of the Circuit Court of the county in which the attorney resides, or in which the alleged violation was committed. In disbarment suits, the action shall proceed as an action between the Executive Director and the respondent. Proceedings in the Circuit Court shall be held in compliance with the Arkansas Rules of Civil Procedure and trial shall be had before the Circuit Judge without a jury.

(2) *If the Circuit Judge finds that the attorney has violated the Model Rules,* he *shall caution, reprimand, suspend, or disbar such attorney as the evidence may warrant. If the Judge finds that the complaint of the Committee is not sustained by the evidence, the proceedings shall be dismissed.*

* * *

SECTION 6.
CRIMINAL ACTIVITY

* * *

B. PROCEDURES UPON CONVICTION. (1) When a complaint against an attorney is based on a conviction of a felony or a crime which also violates Rule 8.4(b) of the Model Rules of Professional Conduct, the Committee *shall* institute an action of disbarment.

* * *

(2) *Actions for disbarment based on the conviction of a crime shall proceed in accordance with the procedures in subsection G of Section 5 of these procedures.*

(3) A certified copy of the judgment of conviction shall be conclusive evidence of the attorney's guilt.

(4) The attorney may not offer evidence inconsistent with the essential elements of the crime for which he was convicted.

* * *

SECTION 7.
SANCTIONS

A. SANCTIONS AUTHORIZED.

When the *Committee* finds that an attorney has violated any provision of the Model Rules, the Committee is authorized:

(1) To warn (which shall be confidential); or

(2) To issue letters of caution or reprimand; or

(3) *To suspend the attorney for a period up to but not exceeding one (1) year; or*

(4) *To cause a complaint to be prepared and filed with the Circuit Court of proper venue in accordance with the manner provided for disbarment actions in subsection G of Section 5 of these Procedures; or* (Emphasis added by Respondent)

* * *

In 1976 the Arkansas Supreme Court interpreted an earlier version of the "Procedures" in the case of *In re Louis Art Doddrill,* 260 Ark. 223, 538 S.W.2d 549 (1976), where the Court held that the circuit court had the power and authority to impose a lesser penalty. Although a different version of the "Procedures" are now in existence the relevant portions concerning the imposition of a lesser penalty remain substantial identical. Because of the short length of the

decision in *Doddrill* the full decision of the Court is quoted herein as follows:

> In February, 1975, the circuit court rendered a judgment suspending petitioner's license to practice law for twelve months and ordering that his license be reinstated thereafter only upon the petitioner's satisfactory passing the regular examination for admission to the Bar administered by the State Board of Bar Examiners. Petitioner argues that the provision of the court's judgment which requires him to satisfactory pass the regular bar examination is a nullity because the circuit judge was without the power or authority to impose such a condition on the reinstatement of his suspended license. Therefore, petitioner asserts that since the one year period of suspension is completed his license shall be forthwith reissued to him.
>
> Proceedings involving the disbarment of an attorney are civil in nature. *Hurst v. Bar Rules Committee of the State of Arkansas,* 260 Ark. 223, 224, 538 S.W.2d 549, 202 Ark. 1101, 155 S.W.2d 697 (1941). Amendment 28 to the Arkansas Constitution (1874) provides:
>
> > The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at Law.
>
> Rule 5 of our Supreme Court Rules on Professional Conduct (1973), promulgated

pursuant to Amendment 28, provides in pertinent part:

> If the Judge or Chancellor finds, upon the hearing before him, that the attorney has been guilty of professional misconduct, he shall reprove, reprimand, suspend, or disbar such attorney, as the testimony may warrant . . .
>
> Either the Committee or the attorney defendant may appeal to the Supreme Court from the action taken by the Judge or Chancellor. . . .

Further, as to jurisdiction, it was succinctly said in *Feldman v. State Board of Law Examiners*, 438 F.2d 699 (8th Cir. 1971):

> The principle is firmly established that the judicial branch of the government, acting through the courts, has exclusive jurisdiction to admit, control and disbar attorneys.

Here, in a disbarment proceeding, the trial court clearly had jurisdiction with the power and authority to impose the lesser penalty; i.e. to conditionally suspend petitioner's license "as the testimony may warrant. . . ." which we equate with the imposition of reasonable conditions upon termination of the suspension. If the condition was unacceptable when imposed, petitioner's remedy

> was by appeal to test the reasonableness of the condition. Admittedly, petitioner failed to exercise his right of appeal within the proper time. Consequently, he is not entitled to a review of his petition which asserts that the court was without the power and authority to require him to pass the bar examination as a condition to the reinstatement of his license.

Petition denied. (Emphasis added by Respondent)

It is with this background that the Arkansas Supreme Court considered the within case in view of the due process and equal protection issues presented. In *Wilson v. Neal*, 341 Ark. 282, 16 S.W.3d 228 (2000), Justice Brown addressed the five-year suspension issue under the present procedures as follows:

> He maintains, however, that our Procedures should be construed so as to limit the circuit judge and this court to a one-year suspension. That is not a correct reading of our Procedures. Under the Procedures in force in 1990, they provided that the Committee was authorized to suspend an attorney from the practice of law for one year. But, a separate section of the Procedures sets forth authority of the circuit judge as opposed to the Committee, once a disbarment action has been filed in that court. If a finding is made that one or more of the Model Rules of Professional Conduct have been violated, the circuit judge in a disbarment action "shall caution, reprimand, suspend, or disbar such attorney as the evidence shall warrant." 1990 Procedures, §5G. (2). Thus,

the whole panoply of sanctions is available to a circuit judge and, concomitantly, to this court. And there is no basis for concluding that because the Committee can suspend a lawyer from the practice for up to one year, circuit judges are similarly limited when meting out sanctions in a disbarment action. Our rules are so clear on this point that there is no valid basis for invoking the canons of statutory construction, as Justice Smith has done. To do so takes a limitation on the Committee's power and impresses it on the circuit judges in disbarment proceedings, which was never contemplated by our Procedures. In sum, the circuit judge in this case had the authority to suspend Mr. Wilson from the law practice for five years.

Nor do I see that Mr. Wilson's due process rights were jeopardized by imposition of a sanction (five-year suspension) of which he contends he had no notice. Again, our Procedures clearly give circuit judges full authority to suspend as the evidence warrants in disbarment matters. This court has found a violation of an attorney's due process rights when that attorney was not notified of a specific rule violation for which he or she might have been sanctioned. See, e.g., Colvin v. Committee on Professional Conduct, 305 Ark. 239, 806 S.W.2d 385 (1991). Here, though, Mr. Wilson was fully apprised of the fact that his sanction might be disbarment. Under these facts it makes little sense to contend that the assessment of a lesser sanction which is authorized by our Procedures violated his right to due process.

Petitioner's argument before the Arkansas Court, as here, is that the "sanctions" section of the "Procedures" limits the committee's authority to suspend for one year and that the circuit judge is equally limited. (§ 7A(3)) Petitioner also attaches significance to the section titles contained in the "Procedures" and argues that a section entitled "Procedure" (Section 5) cannot give authority for "sanctions" which petitioner argues must be found exclusively in the section so titled. (Section 7) The Arkansas Supreme Court has elected to name the entire document regulating professional conduct as "Procedures" even though the document clearly describes the sanctions that can be rendered. The "Procedures" also prescribe the committee's jurisdiction to impose sanctions extending from a warning to a suspension not to exceed one year (Sec. 7A(1), (2), and (3). The committee has no jurisdiction regarding disbarment other than to cause a complaint to be prepared and filed with the circuit court under sub-section (g) of Section 5 of the Procedures. (Procedures, Section 7A(4). Jurisdiction for the disbarment action proceeds under Section 5G which specifically gives the Circuit Judge authority to dismiss, caution, reprimand, suspend or disbar "as the evidence may warrant."

A reading of the procedural rules by the petitioner at the time the petitioner pled guilty would have informed him that a disbarment action by the committee was mandatory. (Section 6B(1)) of the Procedures. A reading of the next paragraph of Section 6B would have advised the petitioner that an action for disbarment "shall proceed" in accordance with "sub-section G of Section 5 of these Procedures". A reading of sub-section G of section 5(2) of the procedures also would have informed the petitioner that the circuit judge would have authority to dismiss the complaint, issue a caution, reprimand, suspension or

disbarment "as the evidence may warrant." Had there been any doubt remaining in the petitioner's mind at that time elementary research of Arkansas decisions interpreting the "Procedures" would have led him to *In re Louis R. Doddrill,* 260 Ark. 223, 538 S.W.2d 549 (1976) where the court held that the trial court had authority to require the petitioner to retake the bar examination as the imposition of a lesser penalty.

B. Rulings By Arkansas' Courts in Similar Attorney Disciplinary Matters Have Not Reached Disparate Results. (Pg. 15)

1. A comparison of the Wilson and Matthews proceeding.

First, Mr. Wilson never argued the comparisons between the Matthews (a white attorney) proceedings and his own (an African-American attorney) proceedings before the Arkansas Supreme Court. As such, the Court should not entertain them now. However, if the Court decides to compare the proceedings involving Mr. Matthews and himself, a full and accurate review of the facts of each case must be presented. The facts in Mr. Matthew's case are established in *Neal v. Matthews,* 342 Ark. 566, 30 S.W.3d 92 (2000). Mr. Matthews pled guilty to two counts of bribery of a small business investment official, a federal misdemeanor in violation of 18 U.S.C. § 215. Matthews received two twelve month prison sentences, with four months of the second sentence to run concurrent with the first. Ultimately, he served fourteen months and there was no restitution to be paid. The trial judge sanctioned Mr. Matthews by suspending his license for 14 months; running the suspension retroactively and immediately reinstating him to the practice of law.

Mr. Wilson pled guilty to three counts of 18 U.S.C. § 658, knowingly disposing of soybeans and rice that were mortgaged and pledged to the FmHA, and two counts of violating 18 U.S.C. § 641, knowingly taking money from a Department of Agriculture bank account and using it for unapproved purposes. All were misdemeanor violations. Mr. Wilson was sentenced to four and one half months in prison with three years of probation.

After disbarment trials and appeals of those trials, both Wilson and Matthews received a suspension of their respective law licenses for five years. It would seem that any disparity due to the circuit judges in this case has been cured by the Arkansas Supreme Court.

2. A comparison of the Meurer and Hollingsworth proceedings.

Mr. Wilson never argued the comparisons between the Meurer (a white attorney) proceedings and the Hollingsworth (an African-American attorney) proceedings before the Arkansas Supreme Court. The Court should not entertain them now. However, if the Court decides to compare the proceedings involving Mr. Meurer and Mr. Hollingsworth, a full and accurate review of the facts of each case must be presented. Mr. Meurer was retained by his client in February, 1997, to file a Chapter 13 bankruptcy petition and was paid a sum of money for his services. Mr. Meurer never filed the petition despite numerous communications from his client. Subsequently, his client's home was lost in foreclosure and she filed her grievance against him with the Committee. The Committee issued a sanction which was appealed by Mr. Meurer. The appeal was de novo to the Committee. On February 12, 1999, Findings of Fact and Consent to Discipline Order (Consent Order) was entered.

(*See* Respondent's Appendix) The Order evidences that Mr. Meurer entered into this Order with the consent of his complaining client. In the Order, Mr. Meurer accepted a reprimand as a sanction for his professional misconduct. As part of the sanction, Mr. Meurer agreed to pay $18,000 in restitution to his client in equal monthly payments of $300. The $18,000 represents the client's lost equity in her home that she lost in the foreclosure. The $18,000 was not money taken from the client as Mr. Wilson asserts.

Meurer failed to make the first payment. The Committee then filed a Petition to Show Cause with the Arkansas Supreme Court. Mr. Meurer personally appeared before the Arkansas Supreme Court and admitted his failure to comply with the Consent Order. Mr. Meurer then made certain statements to the Court and filed an affidavit that was later determined to be untrue. On September 23, 1999, the Arkansas Supreme Court found Mr. Meurer in contempt and reinvested the Committee with jurisdiction to recommend a sanction for his contempt. *See In re Meurer*, 338 Ark. 601, 999 S.W.2d 196 (1999). The Committee recommended disbarment which it completed on June 22, 2000. *See In re Meurer*, 341 Ark. __, 23 S.W.3d 220 (2000). Mr. Wilson is incorrect in his petition when he stated that Mr. Meurer was allowed to voluntarily surrender his license. It is true that in the fall of 1999, the Committee suspended Mr. Meurer's license when he defaulted on two complaints filed against him by former clients. (*See* Respondent's Appendix) Neither complaint involved the theft of client funds.

The details of the Hollingsworth proceedings can be found at *Neal v. Hollingsworth,* 338 Ark. 251, 992 S.W.2d 771 (1999). Mr. Hollingsworth was representing a decedent's estate. He placed the estate's funds in his client trust account, instead of opening a separate trust account. During the five plus years

that he represented the estate, Mr. Hollingsworth failed to file required and appropriate accountings and notices to interested parties which prevented discovery of his misconduct. At one point, the estate balance in Hollingsworth's trust account was $107,888.07. The balance of all Mr. Hollingsworth's client trust moneys was $182.62, a difference of $107,705.45. The Hollingsworth opinion found that Mr. Hollingsworth acted almost entirely without authority of the Probate Court and used the estate's money for his own purposes for a period exceeding five years. True, by the time of the disbarment hearing Mr. Hollingsworth had repaid the principal of the sums misappropriated; he had not repaid the estate the interest lost on those moneys. True, the trial Court only sanctioned Mr. Hollingsworth with a six month suspension and on appeal the Arkansas Supreme Court reversed and remanded the sanction for disbarment which was completed on November 11, 1999. *See In re Hollingsworth*, 339 Ark. __, 4 S.W.3d 492 (1999).

Mr. Wilson alleges that the two attorney discipline cases evidence a violation of the equal protection clauses of the Fourteenth Amendment. It is obvious that any reasonable comparison does not support such a contention.

PERCEIVED MISSTATEMENTS OF FACT OR LAW IN THE PETITION BEARING ON WHAT ISSUES PROPERLY WOULD BE BEFORE THE COURT:

1. The petitioner's statement that "These misdemeanor counts were modified to eliminate all elements of culpability from 18 U.S.C. § 558 and 18 U.S.C. § 641, except the 'knowing' element," is perceived by the respondent as a misstatement. (Petition, Page 3)

2. Petitioner's statement that he was notified of the pending disciplinary action by "general mail" is perceived by the respondent as a misstatement. (Petition, page 3)

3. Petitioner's statement that he objected to the initiation of the disciplinary proceedings on the basis of violations of his constitutional due process rights, is perceived by the respondent as a misstatement. (Petition, page 3)

4. Petitioner's inference that he did not have an attorney representing him at the initial stage of the proceedings is perceived by the respondent as a misstatement. (Petition, page 3-4)

5. Petitioner's statement that the disbarment was based upon "petitioner's actions" which occurred in 1981 and 1982 is perceived by the respondent as a misstatement because the disbarment proceedings were based upon respondent's subsequent "conviction." (Petition, Page 5)

6. Petitioner's statement that the respondent's filing of a petition for writ of certiorari to the Arkansas Supreme Court was because the punishment imposed was not as severe as requested is perceived by the respondent as a misstatement. (Petition, Page 5) The petition for writ of certiorari to the Arkansas Supreme Court was based upon the trial judge's lack of jurisdiction to hear the matter.

7. The petitioner's statement that there was a "total lack of any established standards to be applied by the judges and justices of Arkansas Courts in imposing sanctions" is perceived by the respondent to be a misstatement. (Petition, Page 12 and 21)

8. Petitioner's statement that it was determined by the Arkansas Supreme Court that "no statute of limitations applied to attorney disciplinary proceedings" is perceived by the respondents is a misstatement. (Petition, Page 21)

9. Petitioner's statement that the Arkansas Supreme Court held that "duly elected judges within the jurisdiction where the complaint was filed (if African American) do not assume the same judicial authority to hear cases and causes authorized by Article 7 of the Arkansas Constitution" is perceived by the respondent as a misstatement. (Petition, page 21)

10. Petitioner's statement that the Arkansas Supreme Court under authority of Amendment 28 of the state constitution has "the right to displace duly elected judges even where there has been no recusal of the duly elected judge" is perceived by the respondent as a misstatement. (Page 21)

11. Petitioner's statement that the Arkansas Supreme Court held that the ruling of a "defacto judge did not activate the doctrines of res judicata, collateral estoppel or double jeopardy and any subsequent prosecution of the same party" is perceived by the respondent as a misstatement. (Petition, Page 21)

12. Petitioner's factual review of *In re Meurer* contains several statements that are perceived by the respondent as misstatements. (Petition, Page 18) The specific misstatements are discussed in respondent's brief.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this honorable Court deny the petition.

Respectfully submitted,

LYNN WILLIAMS
STAFF LITIGATION ATTORNEY
ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL
CONDUCT
Justice Building - Room 110
625 Marshall Street
Little Rock, AR 72201
(501) 376-0313

ROBERT J. DONOVAN
Counsel of Record
DAGGETT, VAN DOVER,
DONOVAN & PERRY, PLLC
P.O. Box 646
12 South Poplar Street
Marianna, AR 72360
(870) 295-3434

Attorneys for Respondent

APPENDIX

APPENDIX A — FINDINGS AND CONSENT ORDER OF DISCIPLINE OF THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT *IN RE ROBERT FULLER MEURER*, CPC DOCKET NO. 98-057 DATED FEBRUARY 8, 1999 AND FILED FEBRUARY 12, 1999

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

IN RE: ROBERT FULLER MEURER
ARKANSAS BAR ID#85108
CPC DOCKET NO. 98-057

FINDINGS AND CONSENT ORDER OF DISCIPLINE

The formal charges of misconduct arose from the complaint of Tressia Russell. Ms. Russell was represented by Robert Fuller Meurer, an attorney residing and primarily practicing in Searcy, White County, Arkansas in the matter of a possible bankruptcy which was never filed. Mr. Meurer requested a de novo hearing before the Committee, but immediately prior to the scheduled hearing he entered into the following Findings and Consent Order of Discipline which was accepted and approved by the Committee.

Ms. Russell referred matters to the Committee that occurred from February, 1997 until the present. Ms. Russell met with Mr. Meurer in February, 1997 for a consultation on filing a bankruptcy petition under Chapter 13. Among other indebtedness, Ms. Russell was in arrears on her home mortgage payments. She was quoted an advance fee of $300.00 which she paid by money order and delivered to Mr. Meurer by United States Mail on March 21, 1997. No petition for bankruptcy was filed.

Appendix A

Ms. Russell confronted Mr. Meurer in July, 1997 regarding the status of the bankruptcy petition after she saw a notice in the Des Arc newspaper of a foreclosure sale of her home set for November 12, 1997. Mr. Meurer denied that Ms. Russell had ever paid him the advance fee. On August 11, 1997, she presented him a copy of the United States Post Office trace and copy of the money order personally endorsed by Mr. Meurer on March 21, 1997. He then proceeded to obtain information from her to file a bankruptcy petition which he again never filed. Consequently, Ms. Russell relied on Mr. Meurer's representations that he was filing a bankruptcy petition and that he was taking care of the matter. Ms. Russell in reliance on Mr. Meurer's statements and believing that the foreclosure proceedings were stayed did not attend on the date scheduled for the foreclosure sale of her home. As a consequence of her mistaken belief, she sought no alternative financing and did not attempt to bid on the home at the sale. Ms. Russell's home was sold on November 12, 1997 and she lost the $18,000.00 in equity she had in the home. She requested her file from Mr. Meurer on April 1, 1998 and after a delay received it. To this date, Mr. Meurer has yet to refund any of the $300.00 fee paid by Ms. Russell.

Although Mr. Muerer initially asserted that he engaged in no improper, unethical or unprofessional conduct, upon reconsideration he offered to and agreed to enter into a consent to discipline pursuant to Section 8C(1)(c) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, as revised January 15, 1998. As part of the offer seeking discipline by consent, the attorney, after consultation with his former client, agreed

to compensate her for the loss of the equity in her home. Upon consideration of the formal complaint response herein, and the proposed consent to discipline, the Committee on Professional Conduct finds that:

1. Mr. Meurer's conduct violated Model Rule 1.1, Arkansas Rules of Professional Conduct, when he failed to file a bankruptcy petition and protect Ms. Russell's property interest manifesting an utter lack of thoroughness and preparation necessary to represent his client, Ms. Russell. Model Rule 1.1, Arkansas Rules of Professional Conduct requires in pertinent part that a lawyer shall provide competent representation to a client, including the thoroughness and preparation reasonably necessary for the representation.

2. Mr. Meurer's conduct collectively and singularly, violated Model Rule 1.3, Arkansas Model Rules of Professional Conduct when despite representing Ms. Russell for almost one year, he completely and totally failed to take any legal action in Ms. Russell's behalf. This nonfeasance occurred despite Mr. Meurer knowing the date Ms. Russell's home was going to be sold in a foreclosure sale. Model Rule 1.3, Arkansas Model Rules of Professional Conduct requires that a lawyer shall act with reasonable diligence and promptness in representing a client.

3. Mr. Meurer's conduct collectively and singularly, violated Model Rule 1.4(a), Arkansas Model Rules of Professional Conduct when he failed to inform Ms. Russell that he was not going to file a bankruptcy petition or that he did not file the bankruptcy petition prior to Ms. Russell

foreclosure sale date. After preparing a petition for chapter seven protection in March, when the client had chosen a chapter thirteen petition, he failed to oversee that the correct petition was filed despite numerous telephone calls from Ms. Russell from March to July, 1997. Additionally, after he received her April 1, 1998 letter for the return of her file, he unreasonably delayed delivery of her file to her and her representative. Model Rule 1.4(a), Arkansas Model Rules of Professional Conduct requires that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information.

4. Mr. Meurer's conduct violated Model Rule 1.16(d), Arkansas Model Rules of Professional Conduct, when he failed to promptly return Ms. Russell's file containing her papers upon her request of April 1, 1998, and by not refunding any of the $300.00 fee paid to him for service he failed to render to her. Model Rule 1.16(d) requires, in pertinent part, that upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests, such as surrendering papers and property which the client is entitled and refunding any advanced payment of the fee that has not been earned.

5. Mr. Meurer's conduct violated Model Rule 8.4(c), Arkansas Model Rules of Professional Conduct, when during the entire period of his representation of Ms. Russell, he mislead her into believing that he was filing a bankruptcy in her behalf providing her protection from her creditors and misleading Ms. Russell when he stated to her that he would "take care of everything" regarding the foreclosure of her house when in fact he did nothing. As a result, Ms. Russell

relied on Mr. Meurer and did not attend the foreclosure sale and attempt to take advantage of any of her possible remedies, which included hiring alternative counsel to file a bankruptcy petition. Model Rule 8.4(c), Arkansas Model Rules of Professional Conduct requires that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

WHEREFORE, in accordance with the consent to discipline presented by Mr. Meurer and the Executive Director, James A. Neal, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct that ROBERT FULLER MEURER, Arkansas Bar ID #85108, be, and hereby is REPRIMANDED for his conduct in this matter. Further, pursuant to Sections 8A(1) and 8A(3), it is the decision mid order of the Committee that Mr. Meurer be, and hereby is, assessed the costs in this matter of in the sum of $150.00 due and payable to the Committee at its offices on March 1, 1999, and ordered to make restitution to Ms. Russell in the amount of Eighteen Thousand Dollars and No Cents ($18,000.00). To evidence the terms of the restitution, Mr. Meurer will prepare and execute a promissory note in the amount of the restitution ($18,000.00) in favor of Ms. Russell with payment in equal monthly payments of $300.00 due the 1st of each month beginning February 1, 1999, until paid in full and otherwise reasonably satisfactory to Ms. Russell. Willful failure to make timely payments, in addition to the note's provisions for default, shall also be grounds for a citation of contempt by this Committee before the Arkansas Supreme Court and grounds for further sanction under the Model Rules and the Procedures of this Committee.

Appendix A

ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL
CONDUCT

By: s/ Carlton Bailey
Carlton Bailey
Chairman

Date: February 8, 1999

APPENDIX B — FINDINGS AND ORDER OF THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT *IN RE ROBERT FULLER MEURER*, CPC DOCKET NO. 99-065 DATED SEPTEMBER 29, 1999 AND FILED OCTOBER 22, 1999

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

IN RE: ROBERT FULLER MEURER
ARKANSAS BAR ID#85108
CPC DOCKET NO. 99-065

FINDINGS AND ORDER

The formal charges of misconduct upon which this Order is based arose from the complaint of Deborah Mosley. Ms. Mosley retained Robert Fuller Meurer, an attorney primarily practicing in Searcy, White County, Arkansas to appeal the White County Chancery Judge's adverse decision rendered June 24, 1997, regarding the custody of her children. Ms. Mosley paid Mr. Meurer $3,500.00. On July 7, 1997, Mr. Meurer timely filed the notice of appeal with the White County Circuit Clerk. Ms. Mosley subsequently attempted to contact Mr. Meurer on the status of her appeal with little success. Ms. Mosley was once told by Mr. Meurer that her appeal was pending in the Arkansas Court of Appeals. Later, Ms. Mosley phoned Les Steen, Clerk of the Arkansas Court of Appeals, and discovered no appeal was filed. As of March 23, 1999, no appeal has been filed.

Mr. Meurer was personally served with a copy of the Formal Complaint, pursuant to Section 5E, Procedures of the Arkansas Supreme Court Regulating Professional

Appendix B

Conduct of Attorneys at Law (Procedures), as revised January 15, 1998. Mr. Meurer failed to respond to the Complaint. His failure to respond timely to the Complaint constitutes admission of the factual allegations contained in the Complaint pursuant to Section 5I(4) of the Procedures.

Upon consideration of the formal complaint, the failure to file a response herein and the Arkansas Model Rules of Professional Conduct, the Committee on Professional Conduct finds:

1. That Mr. Meurer's conduct violated Rule 1.3 when he accepted a $3,500 retainer to appeal his client's case of an adverse child custody decision by the White County Chancery Judge and then did not appeal the decision. Other than filing the notice of appeal, Mr. Meurer took no further action, i.e. ordering the transcript, lodging the transcript and filing the necessary briefs or motions to protect Ms. Mosley's appeal. Model Rule 1.3 requires that a lawyer act with reasonable diligence and promptness in representing a client.

2. That Mr. Meurer's conduct violated Rule 8.4(d) of the Arkansas Model Rules of Professional Conduct when he failed to perfect and file the appeal of his client, Ms. Mosley. His failure effectively denied her right to appeal the adverse child custody decision of the White County Chancery Court. Model Rule 8.4(d) states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional

Appendix B

Conduct that ROBERT FULLER MEURER, Arkansas Bar ID #85108, be, and hereby is, SUSPENDED for ONE YEAR for his conduct in this matter. The suspension shall become effective as of the date of the filing of this Order with the Clerk of the Arkansas Supreme Court. Further, pursuant to Sections 5I(1) and 8A(2) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, it is the decision and order of the Committee that Mr. Meurer be, and hereby is, fined in the amount of $250. The fine is imposed as a separate sanction for Mr. Meurer's failure to respond to the complaint.

ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL
CONDUCT

By: s/ Carlton Bailey
Carlton Bailey
Chairman

Date: 9-29-99

APPENDIX C — FINDINGS AND ORDER OF THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT *IN RE ROBERT FULLER MEURER*, CPC DOCKET NO. 99-071 DATED SEPTEMBER 29, 1999 AND FILED OCTOBER 22, 1999

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

IN RE: ROBERT FULLER MEURER
ARKANSAS BAR ID#85108
CPC DOCKET NO. 99-071

FINDINGS AND ORDER

The formal charges of misconduct upon which this Order is based arose from the complaint of Kenneth Konopinski. In July, 1998, Mr. Konopinski retained Robert Fuller Meurer, an attorney primarily practicing in Searcy, White County, Arkansas for $150.00 for Mr. Meurer to file for an expungement of a criminal conviction. Mr. Meurer took no action. In November, 1998, Mr. Konopinski retained Mr. Meurer to represent Mr. Konopinski in a real property dispute. Mr. Konopinski paid $1,200 of the $2,000 requested by Mr. Meurer. No action was taken by Mr. Meurer. Prior to filing his complaint Mr. Konopinski had attempted to contact Mr. Meurer by telephone since December, 1998 without success. On March 24, 1999, Mr. Konopinski sent Mr. Meurer a certified letter to communicate with Mr. Meurer. The letter was returned to Mr. Konopinski, "unclaimed."

Mr. Meurer was personally served with a copy of the Formal Complaint, pursuant to Section 5E, Procedures of the Arkansas Supreme Court Regulating Professional

Appendix C

Conduct of Attorneys at Law (Procedures), as revised January 15, 1998. Mr. Meurer failed to respond to the Complaint. His failure to respond timely to the Complaint constitutes admission of the factual allegations contained in the Complaint pursuant to Section 5I(4) of the Procedures.

Upon consideration the formal complaint, the attorney's failure to respond, and the Arkansas Model Rules on Professional Conduct herein, the Committee on Professional Conduct finds:

1. That Mr. Meurer's conduct violated Model Rule 1.1, when in July, 1998, he was retained by Mr. Konopinski by verbal agreement for $150.00 to represent him in the expungement of a criminal record and failed to take any action; when in November, 1998, he was again retained by Mr. Konopinski to represent him in a real property dispute for which the attorney received 60% of the requested fee in advance and failed to take action. Model Rule 1.1 requires, in pertinent part, that a lawyer provide competent representation to a client, including the thoroughness reasonably necessary for the representation.

2. That Mr. Meurer's conduct violated Model Rule 1.3 when in July, 1998, he was retained by Mr. Konopinski for $150.00 to represent him in the expungement of a criminal record and failed to take any action; and, when in November, 1998, he was again retained by Mr. Konopinski to represent him in a real property dispute for which the attorney received 60% of the requested fee in advance and failed to take action. Model Rule 1.3 requires that a lawyer act with reasonable diligence and promptness in representing a client.

3. That Mr. Meurer's conduct violated Rule 1.4(a) of the Arkansas Model Rules of Professional Conduct, when despite numerous attempts by Mr. Konopinski to contact Mr. Meurer by telephone, the client was unable to communicate with Mr. Meurer; when on March 24,1999, Mr. Konopinski sent Mr. Meurer a certified letter to communicate with Mr. Meurer and the letter was return to Mr. Konopinski, "unclaimed." Model Rule 1.4(a) requires that a lawyer keep a client reasonably informed about the status of a matter and promptly reply with reasonable requests for information.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct that ROBERT FULLER MEURER, Arkansas Bar ID #85108, be, and hereby is, SUSPENDED for TWO YEARS for his conduct in this matter. The suspension shall become effective as of the date of the filing of this Order with the Clerk of the Arkansas Supreme Court.

ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL
CONDUCT

By: s/ Carlton Bailey
Carlton Bailey
Chairman

Date: 9-29-99

APPENDIX D — MEMORANDUM OPINION AND ORDER OF REMAND AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION DATED MARCH 18, 1996

United States District Court,
E.D. Arkansas,
Western Division.

JAMES A. NEAL, as Executive Director of the Supreme Court Committee on Professional Conduct,

Plaintiff,

v.

JIMMIE L. WILSON,

Defendant.

JIMMIE L. WILSON,

Plaintiff,

v.

JACK HOLT, JR., Robert H. Dudley, Tom Glaze, and Donald Corbin, Members of the Supreme Court of the State of Arkansas, John Lineberger, Chancery Judge of the Fourth Judicial District of Arkansas; James Neal, Director of the Arkansas Supreme Court Committee on Professional Conduct; the Members of the Arkansas Supreme Court Committee on Professional Conduct; Robert Donovan,

Appendix D

Attorney for the Arkansas Supreme Court Committee on Professional Conduct; John Doe Defendants and other unknown, each individually and in his official capacity as set out herein,

Defendants.

Civil No. H-C-95-54.

March 18, 1996.

* * *

MEMORANDUM OPINION

H. FRANKLIN WATERS, Chief Judge.

This is a case in which the justice system of Arkansas, represented by the lawyers and the judiciary of this state, has not done itself proud. The long, tortured, and torturous route of this case through the courts of Arkansas, both state and federal, over many long years has ended up about where it started. In this court's view, this has resulted from the numerous lawyers in this case manipulating the system so as to derail it and bring this case to the stalemate that presently exists. The court also believes that the record reflects that the judiciary is not entirely blameless in allowing this to happen.

Although the conduct of Mr. Jimmie L. Wilson which will be described in detail below apparently occurred in 1981 and 1982, and although this case was filed in the Circuit

Appendix D

Court of Phillips County in October of 1991, this matter has gone virtually nowhere during the intervening years. Sadly, when this court ends this portion of the matter as it intends to do and places the case back on course, it will be sitting virtually at the same point on the course where it started.

Background.

As indicated, this all started in 1981 and 1982 when Jimmie L. Wilson, an African-American lawyer, farmer, state legislator, and civil rights activist from the Mississippi River delta region of Eastern Arkansas at or near Helena, stole money from the United States by scheming to sell mortgaged property and by withdrawing funds for unauthorized purposes by lying about the intended use of such funds. His conduct is described in United States v. Wilson, 806 F.2d 171 (8th Cir.1986), an opinion resulting from his first appeal of a conviction by a jury, thusly:

> Defendant practices law and operates a farm in Helena, Arkansas. Between February 1980 and April 1982 he borrowed approximately $775,230.00 from the FmHA for farm operating expenses with the loans primarily secured by an FmHA lien on his crops. To insure compliance with the security agreement entered into at the time of the loans, the FmHA circulated defendant's name on a list of FmHA borrowers to the grain dryers in the region of his farm. The grain dryers would then properly issue checks to defendant and the FmHA as co-payees as payment for crops transported from the farm.

Appendix D

> Between 1981 and December 1982, defendant made multiple sales of grain in the names of Willie Weaver and Reggie Wilson. Willie Weaver, defendant's cousin and co-defendant below, worked as a farm manager for defendant. Reggie Wilson is defendant's son and is a student, not engaged in farming. The government presented evidence that the proceeds from the sales made by Weaver and the junior Wilson, which were issued clear of the FmHA lien, went variously into defendant's law firm account, to cash, into his farm expense account, or toward payment on a bill for farm supplies.
>
> In May 1981, the FmHA required that supervised joint bank account be established in the names of the FmHA and defendant and his wife, Henrietta. FmHA loan proceeds were to be deposited into the joint account, and defendant was required to advise the FmHA of his intended use of funds prior to the time of any withdrawal. On various occasions, defendant would apply to the FmHA to have funds transferred from the joint account to his farm operating account from which he would retransfer the money to his law firm account. A substantial portion of funds was used for the purchase and maintenance of a Mercedes Benz.

Id. at 173.

In that decision and a prior decision later vacated by the court, the Court of Appeals held that the Supreme Court

decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) did not apply retroactively.[1] Subsequently, in Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) the United States Supreme Court held that, indeed, Batson should be applied retroactively. The Court of Appeals then vacated its prior decisions, United States v. Wilson, 815 F.2d 52 (8th Cir. 1987), and remanded the matter to the trial court to determine whether the requirements of Batson had been violated.

Judge G. Thomas Eisele held a hearing and determined that the government had adequately met the test required by Batson by showing that there were other legitimate non-discriminatory reasons for the prosecutor having exercised his peremptory challenges[2] to exclude certain black members of the jury panel from serving on the case. The Court of Appeals for the Eighth Circuit took the matter en banc and ruled, 7-4, that Judge Eisele's decision was clearly erroneous and that, in fact, the requirements of Batson had been violated. The conviction was reversed. United States v. Wilson, 884 F.2d 1121 (8th Cir.1989).

---

1. Of course, Batson held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the [government's] case against a black defendant." Batson, 476 U.S. at 89, 106 S.Ct. at 1719.

2. Of course, since Batson, the juror challenges that have been permitted for centuries at this stage of a trial are misnamed, since "peremptory challenge" means: "The right to challenge a juror without assigning, or being required to assign, a reason for the challenge." Black's Law Dictionary 1136 (6th Ed.1990).

Appendix D

In August of 1990 a plea bargain agreement was reached and Mr. Wilson, on August 22, 1990, appeared before Judge Stephen Reasoner and pled guilty to an information charging him with five misdemeanor counts involving essentially the same conduct for which he had been initially convicted as a result of the felony indictment returned by the grand jury. In pleading guilty to these charges, it appears that he admitted essentially the same conduct as was charged in the felony indictment. See pages 19-21 of the transcript of the sentencing hearing which was attached to the initial complaint filed in this case in state court. He was sentenced to a period of incarceration.

On January 10, 1991, Judge G. Thomas Eisele entered an order in behalf of the entire court for the Eastern District of Arkansas, reciting that, with all judges of the court concurring,[3] Mr. Wilson was immediately suspended from the practice of law in the Eastern District of Arkansas "until final disposition of any disciplinary proceedings commenced as a result of any such conviction." Judge Eisele, again acting for the entire court, by letter dated January 10, 1991, to James A. Neal, executive director of the Arkansas Supreme Court Committee on Professional Conduct, advised the committee of Mr. Wilson's conviction, and advised that he was referring the matter to the committee "for the institution of a disciplinary proceeding before the court in which the sole issue to be determined shall be the extent of the final

3. It was because of this action and his participation in it that Judge George Howard decided to recuse in this case and direct that the matter be transferred to a judge outside the Eastern District of Arkansas. That action resulted in the case being assigned to this judge.

disposition to be imposed as a result of the conduct resulting in the conviction." (quoting from Rule I-D of the Model Federal Rules of Disciplinary Enforcement adopted by the court's for the Eastern District of Arkansas.)

Mr. Neal advised Mr. Wilson by letter dated March 29, 1991, of the institution of the proceedings against him, and advised him of his right to respond to the charges. An attorney entered an appearance for him and made multiple requests for an extension of the time required to respond to the charges. One extension was granted, but subsequent attempts were denied by a letter to Mr. Wilson's attorney dated June 10, 1991, in which Mr. Neal explained that he had consulted with Mr. Eddie Walker,[4] the committee chairman, who had instructed him to deny the request for an additional extension. Mr. Wilson made no response to the charges, and by letter dated July 22, 1991, he was notified that it was "the unanimous decision of the Committee that your conduct in this matter violated the Model Rules of Professional Conduct" and that a disbarment proceeding would be instituted in the event that Mr. Wilson had not voluntarily relinquished his license to practice law in Arkansas within seven days from the receipt of the letter.

On October 9, 1991, a lawsuit was filed in the Circuit Court of Phillips County, Arkansas, seeking his disbarment. Subsequently, the regular judges for that circuit recused for

---

4. Because of claims made in the matter by Mr. Wilson it is, perhaps, pertinent to note that the court knows that Mr. Walker, the chairman of the committee at the time, is a fine lawyer practicing in Fort Smith and was a former Arkansas Worker's Compensation Administrative Law Judge. He also happens to be of African descent.

cause and, months later, on February 21, 1992, the Chief Justice of the Arkansas Supreme Court appointed Judge Lance Hanshaw from Lonoke, Arkansas, in another judicial circuit, to preside in the case.

The case rocked along with numerous continuances being requested and granted until June 19, 1992, when Judge Hanshaw wrote the attorneys for the parties advising that he would deny Mr. Wilson's motion to dismiss the complaint and would grant the motion for summary judgment filed in behalf of the committee. In that letter he said that: "The Defendant's license to practice law is suspended for a period of two (2) years and he shall surrender his license to practice law effective August 1, 1992, and further comply with Rule 11 of the Rules of Professional Conduct adopted March 11, 1985." The attorney for the committee, Robert Donovan, whom Mr. Wilson has since made a party to this case, was directed to draft an order and judgment not inconsistent with the court's opinion.

However, some seven months later, for reasons not clear in the record, by opinion filed February 16, 1993, Judge Hanshaw apparently changed his mind and granted Mr. Wilson's motion to dismiss. Without citing any specific authority, he seemed to simply hold that "the State Committee chose to wait, too long, and the defendant's motion to dismiss is granted and the State's complaint for suspension is dismissed." No applicable statute of limitations or other authority was cited for this conclusion.

In Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994) the court, in an opinion written by Chief Justice Holt,

unanimously reversed the trial court and remanded the case to Judge Hanshaw with directions that he conduct further proceedings consistent with the opinion. However, in a letter dated April 20, 1994, by Judge Hanshaw to the Administrative Office of the Courts, Judge Hanshaw, incredibly, advised that it would be necessary to reassign the case to someone else "since the case has now been reversed and remanded by Chief Justice Jack Holt, Jr." In that letter, just as incredibly, he said:

> While my professional desire was to disbar Mr. Wilson, my research and understanding of the law was clearly explained in my opinion. I do so much disagree with the Chief Justice's opinion as to substance and law that I do not think that it would be appropriate for me to rehear this case.

On May 3, 1994, the acting Chief Justice of the Arkansas Supreme Court appointed Judge Lineberger to preside in the case under the authority of Act 496 of 1965 as amended. For some unknown reason, the order appointing Judge Lineberger was not filed by the Phillips County Clerk until September 14, 1994.

Again, the case rocked on for month after month with numerous requests for extensions of time and continuances being made. By letter dated October 27, 1994, Judge Lineberger set the matter for hearing on December 15, 1994. However, after Mr. Wilson filed a motion for continuance, and after he had also filed a motion asking Judge Lineberger to disqualify so that Judge Olly Neal could hear the case, the matter was continued by order dated December 12, 1994.

Subsequently, the case was reset for January 30-31, 1995, but once again, because Mr. Wilson pointed out that he would be required to be present at a session of the Arkansas Legislature during that period, the case was continued by order dated January 9, 1995. It was finally reset by letter dated April 26, 1995, to start on June 13, 1995, in Marianna, Arkansas. Of course, by this time the case was coming up on its fourth anniversary.

Prior to that time, as the result of a settlement reached in a federal voting rights case, new electoral sub-districts were created providing for a majority of black voters in some electoral sub-districts, including the one in which the Helena, Arkansas, area is located. Mr. Olly Neal,[5] an African-American, was elected to that judgeship. In spite of the fact that the case was clearly assigned to Judge Lineberger and that Judge Lineberger had declined to recuse and have the case reassigned to Judge Neal, Judge Neal attempted to assume jurisdiction and set a hearing for May 18, 1995. The committee, through its attorney, Mr. Donovan, appeared on that date and contested Judge Neal's jurisdiction to proceed.

Judge Neal ruled that he did have jurisdiction to proceed in the case and decided it on the merits. In an order signed

---

5. The committee contends that Judge Neal was disqualified from hearing the case because he was a law partner of Mr. Wilson until some time in 1988 and, in fact, was one of the attorneys representing him in the very criminal proceeding which this disbarment proceeding is all about. It is contended that he, in fact, received, either in behalf of himself or in behalf of a client, some of the funds that were wrongfully obtained by Mr. Neal from the Farmers Home Administration, and that he, by stipulation, testified by letter in the criminal trial.

on May 24, 1995, and entered on May 25, 1995, Judge Neal found that Mr. Wilson had, in fact, violated the Arkansas ethics rules but directed that the only sanctions imposed against him would be a letter of reprimand. The committee sought a writ of certiorari in the Arkansas Supreme Court and by per curiam opinion delivered on June 12, 1995, the court, with two justices dissenting, held that Judge Neal did not have jurisdiction to take the action that he took because the jurisdiction for the case rested with Judge Lineberger pursuant to the court's earlier order. The court found:

> Because we find Judge Neal has proceeded in excess of his authority and jurisdiction, his directives and orders relating to the action between petitioner and respondent are quashed.

It appears from the file that Judge Lineberger, on June 13, 1995, was in Marianna prepared to begin the trial. However, on that same day, Mr. Wilson filed in the United States District Court for the Eastern District of Arkansas, Helena Division, a pleading showing that he was represented by eight separate lawyers or law firms. The pleading was denominated "Petition for Removal; Petition for Temporary and Permanent Injunctive Relief; and Complaint at Law." In so doing, he not only removed the state disbarment proceeding from the Circuit Court of Phillips County to federal court in Little Rock, he also sued about every state official and lawyer on the other side who had even touched the file up to that point. Made parties were all of the Supreme Court justices who had been in the majority on the writ of certiorari, Judge Lineberger, James Neal, the director of the Supreme Court Committee on Professional Conduct, and

each individual member of the committee, Robert Donovan, the committee's lawyer, and John Doe defendants "known and unknown."[6]

Although there is no evidence which can be gleaned from the file which, in any way, supports the allegations, it is alleged, among many other things, that the "Supreme Court members named herein, acquiesced to the petition of the defendants, and it is the belief of the plaintiff herein that the defendants acted conspiratorially to deny the plaintiff, Jimmie L. Wilson, of his constitutional rights asserted herein." It is alleged that it was "the ultimate goal of the defendants in this cause to destroy the plaintiff's legal practice, and to damage his ability to be re-elected to public office by their continuous and unrelenting persecution under color or law." Mr. Wilson and his attorneys point to no evidence to support these claims, and the only circumstance that might cause him to believe what he says is that these individuals did not ultimately agree with his position which he took in this proceeding which was working its way, albeit slowly, through the justice system.

After the case was filed in federal court in the Eastern District of Arkansas, the judge to whom it was assigned, George Howard, held a telephone conference call with counsel and advised that, since the federal court now had jurisdiction of the case, it did not appear that the temporary restraining order requested by Mr. Wilson was necessary. He also advised counsel that he had had a discussion with Judge Lineberger by telephone earlier that day and that Judge

---

6. The court will collectively refer to these parties as "the State."

Lineberger recognized that his jurisdiction had ended and that he did not intend to proceed with the trial which was to have commenced that day. Counsel agreed that the restraining order was not necessary, under the circumstances, so no further action was taken other than the requirement of a cost bond and some discussion about proceedings that would follow.

While the files have multiplied almost exponentially by papers submitted by the lawyers since that time, little of a substantive nature has occurred during the more than nine months this case has been sitting in this court. Soon after the case was removed, a motion to remand pointing out reasons why this court did not have subject matter jurisdiction was filed, but no action was taken on it before Judge Howard recused. The file was received by this judge on the afternoon of March 11, 1996.

Motion to Remand.

The State requests the remand of the disbarment action to the Phillips County Circuit Court from which it was removed on June 13, 1995. The State asserts that the removal was improvident for the following reasons: (1) the matters sought to be removed are not civil actions within the meaning of the federal removal statutes and federal removal jurisprudence; (2) no federal question appears on the face of the state court complaint; (3) the petition for removal is time barred; and, (4) there are a number of procedural irregularities with the removal petition itself.

Wilson opposes remand arguing that removal was both timely and proper under the applicable removal statutes.

Additionally, Wilson argues that the disbarment proceedings are quasi criminal in nature and subject to constitutional safeguards. According to Wilson, the alleged violation of these constitutional safeguards states a federal cause of action and establishes the jurisdictional nexus with the petition to remove. The second amended petition for removal asserts that removal is based upon 28 U.S.C. § 1443 and § 1446(b).

"The right to removal from a state court to a federal court exists only in certain enumerated classes of actions, and in order to exercise the right of removal, it is essential that the case be shown to be one within one of those classes." Schwinn Bicycle Co. v. Brown, 535 F.Supp. 486, 487 (W.D.Ark.1982) (citations omitted). The removal statutes are strictly construed in favor of state court jurisdiction. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214 (1941). Removal is effected when the notice of removal is filed in state court. Anthony v. Runyon, 76 F.3d 210 (8th Cir.1996).

The court has the duty to fully consider the pleadings filed in this matter and determine whether subject matter jurisdictions exists. Any action taken by a federal court which lacks subject matter jurisdiction is a nullity and either party, even the party that invoked the jurisdiction of the court, can attack jurisdiction at any time even after judgment is rendered against him. American Fire & Cas. Co. v. Finn, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951).

When determining whether removal is proper, a court may only examine the face of the complaint and cannot rely on an anticipated defense raised by the defendants. Franchise

Appendix D

Tax Board of the State of Cal. v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (well-pleaded complaint rule). A federal question must be an essential element of the plaintiff's complaint to provide grounds for removal. Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127, 94 S.Ct. 1002, 1003-04, 39 L.Ed.2d 209 (1974). The plaintiff is, then, master of the complaint and can generally avoid federal jurisdiction by omitting claims that arise under federal law. Gully v. First National Bank in Meridian, 299 U.S. 109, 112-113, 57 S.Ct. 96, 97-98, 81 L.Ed. 70 (1936).

The state court complaint at issue asserts that Wilson violated the ethical standards for his profession and that disbarment is warranted under the applicable Arkansas state rules and procedures regulating professional conduct. The complaint does not rely upon the Constitution, laws, or treaties of the United States.

The only federal question raised in this case is by the defendant. Removal is therefore not proper, Caterpillar Inc. v. Williams, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987), unless an exception to the well-pleaded complaint rule applies. Rogers v. Rucker, 835 F.Supp. 1410 (N.D.Ga.1993). Section 1443 provides a statutory exception to the well-pleaded complaint rule for certain civil rights actions. Id. at 1412.

However, this action does not fall within the class of cases removable under § 1443(1). Section 1443(1) provides for the removal by a defendant of any civil action or criminal prosecution "[a]gainst any person who is denied or cannot

enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof. . . ." 28 U.S.C. § 1443(1).

There are two broad restrictions upon removal under § 1443(1). "First, removal is limited to cases involving 'a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof,' and second, the petitioner for removal must show that he 'is denied or cannot enforce [such a right] in the courts of such State.' " Bar Association of Baltimore City v. Posner, 391 F.Supp. 76, 79 (D.Md.1975). See also Johnson v. Mississippi, 421 U.S. 213, 95 S.Ct. 1591, 44 L.Ed.2d 121 (1975).

The Supreme Court has held that the phrase "any law providing for equal civil rights" must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Georgia v. Rachel, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925 (1966). "Thus, removal has been held improper in a variety of cases involving alleged infringements of fundamental federal rights" on the grounds that these rights are not stated in terms of racial equality. Bar Association of Baltimore City v. Posner, 391 F.Supp. 76, 79 (D.Md.1975).

To show that he is being denied or cannot enforce his equal rights in the courts of Arkansas, Wilson must show either

> that there is a basis for a firm prediction that such rights [of racial equality] will be denied in state

> court or that the pendency of the prosecution without more, is a deprivation of such a federally protected right. It is not enough to show that he has a defense with more or less hope of its successful assertion in an impartial tribunal; he must show that his federally secured right of racial equality is denied by the pendency of the proceeding or "by reasons of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by . . . bringing the defendant to trial in the state court."

State of South Carolina v. Moore, 447 F.2d 1067, 1070 (4th Cir.1971). See also Greenwood v. Peacock, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966). Allegations that an individual is being denied equal protection by discriminatory prosecution of professional misconduct and assorted allegations of denial of due process have been held insufficient to support removal under this section. Bar Association of Baltimore City v. Posner, 391 F.Supp. 76, 79 (D.Md.1975).

Wilson contends his removal petition raises the following issues: (1) denial of due process; (2) denial of equal protection; (3) violation of his citizenship rights under Section 2 of the Voting Rights Act of 1965, as amended, and the Thirteenth Amendment of the United States Constitution; (4) violation of federally established rights under 42 U.S.C. § 1981, 42 U.S.C. § 1983, and 42 U.S.C. § 1985; (5) violation of the doctrine of equitable estoppel/ double jeopardy; and (6) violation of his constitutional rights of the United States Constitution insomuch as the rules,

procedures, and laws under which petitioner was being prosecuted were violative of the United States Constitution. Wilson's Brief of July 17, 1995, at 7. Wilson takes the position that the Arkansas Supreme Court's action in appointing a special chancellor to the Phillips Circuit Court to preside over Neal v. Wilson violated the federal Voting Rights Act and the Thirteenth Amendment to the United States Constitution.

Wilson's allegations regarding the denial of constitutional rights generally are clearly insufficient to support removal under § 1443. Johnson v. Mississippi, 421 U.S. 213, 219, 95 S.Ct. 1591, 1595, 44 L.Ed.2d 121 (1975) (Claims that an action "will violate rights under constitutional or statutory provisions of general applicability or under statutes not protecting against racial discrimination, will not suffice."); Doe v. Berry, 967 F.2d 1255, 1257 (8th Cir.1992) (42 U.S.C. § 1983 and 42 U.S.C. § 1985(3) do not meet the test and cannot support removal under § 1443), cert. denied, 507 U.S. 911, 113 S.Ct. 1258, 122 L.Ed.2d 656 (1993). However, courts have held that certain of the statutes relied upon by Wilson qualify as laws providing for "equal civil rights." For instance, the Voting Rights Act confers rights specifically in terms of racial equality and has been held to support removal under § 1443. See e.g., Smith v. Winter, 717 F.2d 191 (5th Cir.1983); Jackson v. Riddell, 476 F.Supp. 849 (N.D.Miss.1979). Additionally, § 1981 qualifies under the statutory definition. Greenwood v. Peacock, 384 U.S. 808, 825, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966).

Assuming for the sake of argument that he has sufficiently asserted a cause of action under a statute securing

racial equality, which the court does not believe he has, Wilson still has not alleged facts which indicate he would be unable to adequately exercise or enforce his rights under these statutes in state court. See Bar Association of Baltimore City v. Posner, 391 F.Supp. 76, 83 (D.Md.1975). As the Supreme Court has stated, to show that he is being denied or cannot enforce the specified federal rights in the courts of the state, Wilson must normally show "that the 'denial be manifest in a formal expression of state law,' . . . such as a state legislative or constitutional provision, 'rather than a denial first made manifest at the trial of the case.' " Johnson, 421 U.S. at 219, 95 S.Ct. at 1595 (citations omitted). Clearly, Wilson has failed to make the required showing, so removal is not supported by the provisions of § 1443.

Additionally for the reasons stated below, we believe the removal was untimely. Section 1446 sets forth the procedures to be used for removal of actions from state to federal court. Section 1446(b) contains two separate time limitations with respect to the removal of civil cases. First, if the initial pleading states a basis for federal jurisdiction, a notice of removal "shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . ." 28 U.S.C. § 1446(b). Second, if the case stated in the initial pleading was not removable, "a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. . . ." Id.

Appendix D

The state court disbarment proceeding was filed on October 9, 1991. The action was removed on June 13, 1995. Clearly removal was untimely unless the second thirty day period set forth in § 1446(b) is applicable. Wilson argues that it is. Wilson asserts that this action first became removable when the Arkansas Supreme Court issued the "administrative order . . . affirming its appointment of the Honorable Judge John Lineberger as Special Judge in the cause of Neal v. Wilson, Phillips County Circuit No. CIV-91-147. . . ." Wilson's Brief of August 25, 1995, at 1-2. In essence, Wilson argues the Arkansas Supreme Court's ruling constitutes "other paper" which converts the action into a removable action.

Generally, a non-removable action may only be converted into a removable action by "paper" resulting from some voluntary act of the plaintiff. S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 494 (5th Cir.1996); Gaitor v. Peninsular & Occidental S.S. Co., 287 F.2d 252, 254 (5th Cir.1961) ("other paper" requires a voluntary act of the plaintiff); Horton v. Scripto-Tokai Corp., 878 F.Supp. 902 (plaintiff must do something voluntarily to change the nature of the case and render it removable). It is a well established doctrine that a case may not be heard in district court when the only federal question posed is raised by a defense argument. Caterpillar Inc. v. Williams, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987).

The per curiam order of the Supreme Court of Arkansas issued on June 12, 1995, in response to James Neal's petition for writ of certiorari did not convert the otherwise unremovable case into a removable one. The opinion merely reaffirmed the validity of the court's appointment of a special circuit judge to hear the disbarment proceedings.

Appendix D

Judge Lineberger was appointed by the Arkansas Supreme Court to hear the case on May 3, 1994. The order assigning Judge Lineberger was for some reason not filed in the Phillips County case, Neal v. Wilson, until September 14, 1994. Judge Neal was elected on November 3, 1992, and assumed office shortly thereafter. Thus if any impropriety giving rise to a violation of the Voting Rights Act, or any other statute relied on by Wilson, occurred in connection with the appointment of Judge Lineberger, it occurred on May 3, 1994, or at the latest when the order of assignment was filed in Phillips County. It was the act of appointment not the issuance of the opinion on June 12, 1995, which allegedly violated Wilson's rights and purportedly made the disbarment action removable.

Wilson was well aware of the appointment of Judge Lineberger and in fact asked him to recuse. When Judge Lineberger refused, Wilson did not raise the issue with the Supreme Court but instead later asked Judge Neal to exercise jurisdiction over the case despite the fact that the Arkansas Supreme Court had assigned the case to another judge. The Arkansas Supreme Court then in ruling on the writ of certiorari declared Judge Neal's assumption of jurisdiction to be void because of their earlier appointment. This action did not begin the running of the thirty day period for removal. The removal was therefore untimely. An order will be entered remanding the disbarment action to the Phillips County Circuit Court.[7]

---

7. The clerk will also be directed to refund to Wilson the $500 cost bond. Since 1988 the removing party has not been required to post a cost bond.

However, this decision does not end the case. As the court and the parties have recognized, the allegations of the combined petition for removal/complaint at law really encompassed two separate legal actions, the first action being the state court disbarment action which was removed. The second action consists of a federal cause of action for declaratory and injunctive relief based on the alleged constitutional violations. These allegations were presented in the form of a counterclaim and third party complaint. We will proceed to analyze the parties arguments concerning whether this court can legitimately proceed to deciding the merits of the action for declaratory and injunctive relief.

Younger v. Harris Abstention.

The State takes the position, inter alia, that the court must abstain from exercising jurisdiction over the allegations of the counterclaim/third party complaint under the doctrine set forth in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

In Younger v. Harris the Supreme Court "instructed federal courts that the principles of equity, comity and federalism in certain circumstances counsel abstention in deference to ongoing state proceedings." Fieger v. Thomas, 74 F.3d 740, 743 (6th Cir.1996). In the case of Middlesex Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), a case that appears to be directly on point, the Supreme Court addressed the applicability of this doctrine to pending state disciplinary proceedings. The Court noted that Younger and "its progeny espouse a strong federal policy against federal-court

interference with pending state judicial proceedings absent extraordinary circumstances." Middlesex, 457 U.S. at 431, 102 S.Ct. at 2521. If Younger abstention applies it is not appropriate to address the merits. Greening v. Moran, 953 F.2d 301, 304 (7th Cir.1992), cert. denied, 506 U.S. 824, 113 S.Ct. 77, 121 L.Ed.2d 42 (1992). "To say that abstention is in order then is to say that federal courts should not address the merits, period. Silence by the federal court is the objective of abstention; the desirability of silence is the reason for abstention." Greening, 953 F.2d at 304.

In Middlesex, a New Jersey attorney, Lennox Hinds, was being charged in a disciplinary proceeding with violating two sections of the Disciplinary Rules of the Code of Professional Responsibility as a result of statements he made during a press conference which were critical of an ongoing criminal trial and the trial judge's judicial temperament and racial insensitivity. Middlesex, 457 U.S. at 428, 102 S.Ct. at 2519. Instead of replying to the charges of the Ethics Committee, Hinds filed a suit in federal district court contending the disciplinary rules violated his First Amendment rights. Additionally, he asserted that the rules were facially vague and overbroad. Middlesex, 457 U.S. at 429, 102 S.Ct. at 2519-20.

In analyzing the applicability of Younger the Court applied the following threefold analysis: "first, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise

constitutional challenges." Middlesex, 457 U.S. at 432, 102 S.Ct. at 2521. The Court answered each question affirmatively.

First, the court found the that under New Jersey law the disciplinary proceedings were judicial in nature. As the proceedings were judicial, the Court noted "the proceedings are of a character to warrant federal-court deference." Id., 457 U.S. at 434, 102 S.Ct. at 2522. Second, the Court noted that the State of New Jersey "has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." Id. "The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice." Id. It also noted that the State's interest in the present litigation was demonstrated by the fact that the Ethics Committee, an agency of the New Jersey Supreme Court, was named as a defendant. Id.

Finally, it noted that Hinds had failed to even attempt to raise any federal constitutional challenges in the state proceedings. Id., 457 U.S. at 435, 102 S.Ct. at 2522-23. Because Hinds has an " 'opportunity to raise and have decided by a competent state tribunal the federal issues involved' . . . and because no bad faith, harassment, or other exceptional circumstances dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings." Id., 457 U.S. at 437, 102 S.Ct. at 2524. See also Fieger v. Thomas, 74 F.3d 740 (6th Cir.1996) (federal district court should abstain from deciding constitutional challenge to state disciplinary rules where state

disciplinary proceedings are ongoing); Hirsh v. Justices of the California Supreme Court, 67 F.3d 708 (9th Cir.1995) (abstention proper when a federal court complaint alleged the disciplinary system deprived attorneys of various constitutional rights, including due process, equal protection, the right to vote, and the right to court access).

The Arkansas Supreme Court has exclusive jurisdiction over the conduct of Arkansas attorneys and has the power to make "rules regulating the practice of law and the professional conduct of attorneys of law." Ark. Const. Amend. No. 28; Dodrill v. Executive Director, Committee on Professional Conduct, 308 Ark. 301, 824 S.W.2d 383 (1992); Sexton v. Arkansas Supreme Court Comm. on Professional Conduct, 299 Ark. 439, 774 S.W.2d 114 (1989), cert. denied, 494 U.S. 1066, 110 S.Ct. 1782, 108 L.Ed.2d 784 (1990). "Amendment 28 certainly put to rest for all time any possible question about the power of the courts to regulate the practice of law in the state. There can be no doubt that the power of the judicial department, acting through this court, is, in this respect, exclusive and supreme under this amendment, if the power was not already inherent in the courts." McKenzie v. Burris, 255 Ark. 330, 340, 500 S.W.2d 357 (1973).

"The Rules of Professional conduct are the substantive rules governing the bar." Sexton v. Supreme Court Comm. on Professional Conduct, 297 Ark. 154A, 154B, 761 S.W.2d 602 (1988). The Arkansas Supreme Court Committee on Professional Conduct acts as an arm of the Supreme Court in matters relating to the supervision and licensing of Arkansas attorneys. However, the Committee does not

exercise judicial power; rather the Committee's function "is in the nature of an administrative agency, which is not bound by the rules of the courts." Sexton v. Arkansas Supreme Court Comm. on Professional Conduct, 299 Ark. 439, 446, 774 S.W.2d 114 (1989), cert. denied, 494 U.S. 1066, 110 S.Ct. 1782, 108 L.Ed.2d 784 (1990). The Committee on Professional Conduct enforces the substantive rules. Sexton, 297 Ark. at 154B, 761 S.W.2d 602.

The rules governing the action of the Committee and setting forth its procedures provides that, in the event a majority of the committee votes for disbarment, an action for disbarment will be filed with the Clerk of the Circuit Court of the county in which the attorney resides, or in which the alleged violation was committed. Procedures of the Court Regulating Professional Conduct of Attorneys at Law § 5(E)(5) & § 5(G). The action proceeds as an action between the Executive Director and the attorney. Id. § 5(G)(1). The proceedings are to be held in compliance with the Arkansas Rules of Civil Procedure. Id. If the Circuit Judge finds a violation of the ethical rules he may caution, reprimand, suspend or disbar the attorney. Id. at § 5(G)(2). If the attorney does not agree with the decision, he may appeal to the Arkansas Supreme Court. Id. at § 5(H). The appeal is heard de novo. Id. at § 5(H)(3).

We conclude application of the Middlesex threefold test requires abstention in this case. First, the disbarment proceeding is clearly judicial in nature. New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 371, 109 S.Ct. 2506, 2520, 105 L.Ed.2d 298 (1989); Middlesex, 457 U.S. at 433, 102 S.Ct. at 2522. See also

Fieger, 74 F.3d at 744 (Even if state disciplinary procedures were characterized as administrative, abstention would be appropriate under Ohio Civil Rights Comm'n v. Dayton Christian Sch., 477 U.S. 619, 627, 106 S.Ct. 2718, 2722, 91 L.Ed.2d 512 (1986).); Hirsh, 67 F.3d at 712; Greening, 953 F.2d at 304. Second, it cannot be disputed that the state has a strong interest in maintaining and assuring the professional conduct of the attorneys it licenses. "The fact that [Wilson] poses a constitutional challenge to the substance of the rules of professional conduct as well as the procedures adopted to enforce them does not overcome [Arkansas's] interest." Fieger, 74 F.3d at 744.

Finally, Wilson's constitutional challenges can be determined in the state court proceedings. "Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights." Middlesex, 457 U.S. at 431, 102 S.Ct. at 2521. In fact, the Supreme Court has held abstention to be appropriate "unless state law clearly bars the interposition of the constitutional claims." Moore v. Sims, 442 U.S. 415, 425-26, 99 S.Ct. 2371, 2379, 60 L.Ed.2d 994 (1979).

The Arkansas Supreme Court has heard and ruled on constitutional challenges presented by attorneys during disciplinary hearings. See e.g., Arens v. Committee on Professional Conduct of the Supreme Court of Arkansas, 307 Ark. 308, 820 S.W.2d 263 (1991) (Fifth and Fourteenth Amendments to the United States Constitution); Sexton v. Arkansas Supreme Court Comm. on Professional Conduct, 299 Ark. 439, 774 S.W.2d 114 (1989) (procedural due process), cert. denied, 494 U.S. 1066, 110 S.Ct. 1782, 108

L.Ed.2d 784 (1990); Eaton & Benton v. Supreme Court of Arkansas Comm. on Professional Conduct, 270 Ark. 573, 607 S.W.2d 55 (1980) (regulations on legal advertising did not violate the First Amendment), cert. denied, 450 U.S. 966, 101 S.Ct. 1483, 67 L.Ed.2d 615 (1981).

Wilson strenuously argues that Younger is inapplicable because the state officials are proceeding with the disciplinary proceedings in bad faith. See e.g., Bishop v. State Bar of Texas, 736 F.2d 292 (5th Cir.1984) (claim that state bar prosecuted disciplinary proceedings against an attorney for many years was sufficient to state a claim that the disciplinary proceedings were taken in bad faith and for an improper motive). According to Wilson "[b]ad faith and the denial of due process can clearly be imputed to the respondents from the facts of this case." Wilson's Brief of July 17, 1995 at 11.

In support, Wilson asks the court to consider the following facts: (1) the disciplinary action was commenced approximately a decade after the sanctionable conduct was committed; (2) there have been two trials in this case; (3) although the Committee prevailed in the second trial they objected to the particular judge presiding in the case and appealed via a writ of certiorari; (4) Wilson's request to do discovery to substantiate his claim of selective prosecution was denied by the judge appointed by the Supreme Court; (5) a special judge was appointed despite the fact that a regularly elected circuit judge had not recused or otherwise disqualified himself from the case; (6) the appointment of a special judge was in violation of Arkansas law and an improper incursion on the jurisdiction of the regularly elected

circuit judge; (7) Wilson's political and social activist activities have incurred considerable ire from persons closely connected with the Committee; (8) the Committee asked for and received a ruling eliminating the statute of limitations in this case; (9) all rules regulating the issuance of writs of certiorari were bypassed for the Committee; (10) the action was commenced while Wilson was in prison and did not have the opportunity to defend himself; (11) absolute disbarment was requested when lesser sanctions are available; (12) the fact that the Committee took an appeal from a favorable decision; and (13) the open hostility of the State toward Wilson as exhibited by its action, language and conduct in the court. Id. at 11-13. See also Wilson Brief of August 25, 1995, at 27-30.

Wilson also contends that this case is a reincarnation of the case of Lewellen v. Raff, 843 F.2d 1103 (8th Cir.1988). Wilson argues the same environment that gave rise to Lewellen has resurfaced to give rise to the instant case. According to Wilson, "[t]here is absolutely no reason but bad faith, harassment, vindictiveness, and racial animosity that would prompt the Supreme Court Committee on Professional Conduct to appeal a decision that was favorable to the Committee and subject Wilson to a third trial on disbarment." Wilson Brief of July 17, 1995, at 17. In Wilson's view, the State's problem with the decision is quite simple; The decision "was not harsh enough and it was rendered by a black judge to a black defendant." Id. See also Wilson Brief of August 25, 1995, at 27-28 (extraordinary act in disregard for the constitutional authority of Judge Neal, extraordinary use of administrative authority of the court to usurp the authority of a duly elected judge, and the resulting denial of the right to franchise).

Appendix D

In Lewellen the Eighth Circuit was reviewing the decision of a district court to preliminarily enjoin the prosecution of a state criminal trial. The court noted that "[t]he allegations in Lewellen's complaint painted a picture of pervasive racism and discriminatory treatment of blacks in the Lee County court system." Lewellen, 843 F.2d at 1110. The evidence also described an environment in which Lewellen would not be assured adequate vindication of due process and equal protection. Id. at 1111.

The Eighth Circuit in reviewing the district court's findings under the clearly erroneous standard upheld the injunction under the bad faith and harassment exception to the Younger abstention doctrine. Id. at 1112-113.

Nothing presented to this court indicates that the environment present in Lewellen is present in this case. The initiation of disbarment proceeding was in response to Wilson's pleading guilty to criminal conduct involving dishonesty, to say the least. The Committee's seeking of a writ from the Arkansas Supreme Court was in response to a legitimate concern and does not constitute evidence of bad faith. Judge Lineberger had been appointed to preside over the case by the Arkansas Supreme Court and in fact had been exercising that jurisdiction. Judge Neal at the behest of Wilson attempted to wrest jurisdiction over the case from Judge Lineberger by jumping into the fray and hearing the case on the merits prior to Judge Lineberger issuing a decision on the merits. He obviously knew that the case had been assigned by the state's highest court to Judge Lineberger and that it was set to be heard in June.

Appendix D

We have already discussed in great detail the factual background of this case and will not repeat that discussion here. As our discussion of the facts and history of the present controversy indicates, Wilson's characterization of the events is simply inaccurate or tendentious. The record before us is extensive. We simply find no evidence of "bad faith, harassment, or some other circumstances that would make abstention inappropriate." Middlesex, 457 U.S. at 435, 102 S.Ct. at 2523. See also Fieger, 74 F.3d at 750. Other than the bare assertions of Wilson, there is no evidence that any of the decisions made by the members of the ethics committee or the judges of the Arkansas Supreme Court were motivated by bad faith, racial discrimination, or intent to harass. His contentions in this respect boil down to little more than a belief by him that, since the state actors disagree with him and his lawyers, they must have racially discriminatory motives. That simply doesn't follow.

Quite simply, the allegations are insufficient to establish the extraordinary circumstances under which Younger abstention is inappropriate. See e.g., Hirsh, 67 F.3d at 713-14; Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718, 724 (6th Cir.1993), cert. denied, 508 U.S. 940, 113 S.Ct. 2416, 124 L.Ed.2d 639 (1993). We believe the case before us falls squarely within the abstention doctrine set forth in Younger v. Harris and applied by the Supreme Court to constitutional challenges to pending state disciplinary proceedings in Middlesex. Therefore, the allegations of the counterclaim/third party complaint will be dismissed by a separate order entered concurrently herewith. Trainor v. Hernandez, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977).

Appendix D

To the extent Wilson's arguments regarding the appointment of a special judge by the Arkansas Supreme Court can be read to assert claims unrelated to the disbarment proceeding, we will address the parties' arguments regarding the court's jurisdiction to review the decision of the Arkansas Supreme Court.

Rooker-Feldman Doctrine.

Alternatively, the State takes the position that the court must dismiss the allegations of the counterclaim/third party complaint under the Rooker-Feldman doctrine.[8] We believe that if this doctrine has any applicability it is only to the decision of the Arkansas Supreme Court regarding the appointment of Judge Lineberger to the Phillips County case.

The Court of Appeals for the Eighth Circuit recently examined this doctrine and summarized it in the following terms:

> The Rooker-Feldman doctrine states that district courts do not have subject matter jurisdiction over challenges to state court decisions in judicial proceedings. Rooker v. Fidelity Trust Co., 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 103 S.Ct. 1303, 1311, 75 L.Ed.2d 206 (1983). The only court with jurisdiction to review decisions of state courts is the United States Supreme Court. A federal

8. See also 28 U.S.C. § 1738.

> district court has jurisdiction over general constitutional challenges if these claims are not inextricably intertwined with the claims asserted in state court. A claim is inextricably intertwined if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. In other words, Rooker-Feldman precludes a federal action if the relief requested in the federal action would effectively reverse the state court decision or void its ruling.

Charchenko v. City of Stillwater, 47 F.3d 981, 983 (8th Cir.1995) (citations omitted). See also LaNave v. Minnesota Supreme Court, 915 F.2d 386, 388 (8th Cir.1990), cert. denied, 500 U.S. 923, 111 S.Ct. 2028, 114 L.Ed.2d 113 (1991). The doctrine "is broader than claim and issue preclusion because it does not depend on a final judgment on the merits." Charchenko, 47 F.3d at 983 n. 1.

Wilson argues the Rooker-Feldman doctrine is inapplicable on the grounds that the act of the Arkansas Supreme Court in granting the writ of certiorari and voiding Judge Neal's ruling was administrative rather than judicial. We reject this argument. Perhaps the act of appointing a special judge in the first instance can be regarded as administrative rather than judicial; however, the act of declaring the decision of one judge to be void on the grounds that a different judge was given authority over the case is clearly judicial in nature. Thus, the application of the Rooker-Feldman doctrine precludes review.

Appendix D

Conclusion.

It makes no difference to this court whether Mr. Wilson is ultimately disbarred — it is simply none of this federal court's business. However, the simple fact is that this court has no removal jurisdiction of this case and never did, and didn't during any of the 9 month period when the pendency of this matter in this court served to stall the proceedings. This court is convinced that it is in the interest of all parties and in the public interest for this matter which has been going on in one form or another for well over a decade, to come to a conclusion one way or the other.

For the reasons stated above, the disbarment action will be remanded to the Circuit Court of Phillips County, Arkansas. Additionally, the court will abstain from deciding the issues raised in the counterclaim/third party complaint and that portion of the case will be dismissed. A separate order in accordance herewith will be concurrently entered.

Appendix D

ORDER OF REMAND & JUDGMENT

On this 14th day of March, 1996, the court finds for the reasons stated in a memorandum opinion of even date as follows:

(1) The case of Neal v. Wilson, Civ. No. 91-147 which was removed to this court on June 13, 1995, was improvidently removed and should be and hereby is remanded to the Circuit Court of Phillips County, Arkansas. The clerk of this court is directed to send a certified copy of this order to the clerk of the state court. The clerk is also directed to refund to Jimmie L. Wilson the cost bond in the amount of $500 which was deposited at the time of removal.

(2) The court will abstain from deciding the issues raised in the federal court action for declaratory and injunctive relief (referred to as the counterclaim/third party complaint) and this portion of the case is dismissed. Alternatively, the court holds that application of the Rooker-Feldman doctrine precludes review.

IT IS SO ORDERED.

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND DECIDED APRIL 25, 1997

United States Court of Appeals,
Eighth Circuit.

JAMES A. NEAL, Director of Arkansas Supreme Court Committee on Professional Conduct,

Plaintiff/Appellee,

v.

JIMMIE L. WILSON,

Defendant/Appellant,

v.

JACK HOLT, JR., Member of the Supreme Court of the State of Arkansas; Robert H. Dudley, Member of the Supreme Court of the State of Arkansas; Tom Glaze, Member of the Supreme Court of the State of Arkansas; Donald Corbin, Member of the Supreme Curt of the State of Arkansas; John Lineberger, Chancery Judge of the Fourth Judicial District of Arkansas; Members of Arkansas Supreme Court Committee on Professional Conduct; Robert Donovan, Attorney for the Arkansas Supreme Court Committee on Professional Conduct; John Doe, Defendants and other unknown John Doe Defendants, known and unknown, each individually and in his official capacity as set out herein; Ken Reeves, Chairman; Sue Winter, Secretary; Carlton Bailey, Member of the Arkansas Supreme Court Committee

on Professional Conduct; Allen Humphries, Member of the Arkansas Supreme Court Committee on Professional Conduct; Richard A. Reed, Member of the Arkansas Supreme Court Committee on Professional Conduct; Burt Virden, Member of the Arkansas Supreme Court Committee on Professional Conduct; Patricia Youngdahl, Member of the Arkansas Supreme Court Committee on Professional Conduct,

Third Party Defendants/Appellees.

No. 96-2112.

Submitted Jan. 15, 1997.
Decided April 25, 1997.

* * *

Before WOLLMAN and FLOYD R. GIBSON, Circuit Judges, and MONTGOMERY,[1] District Judge.

WOLLMAN, Circuit Judge.

Jimmie Wilson appeals from the district court's[2] order remanding his disbarment case to state court and dismissing a complaint Wilson filed against various Arkansas officials. We affirm.

---

1. The HONORABLE ANN D. MONTGOMERY, United States District Judge for the District of Minnesota, sitting by designation.

2. The Honorable H. Franklin Waters, United States District Judge for the Western District of Arkansas, sitting by designation.

Appendix E

I. Background

The background of this case stretches back almost seventeen years and involves numerous proceedings in state and federal court. Wilson, an African-American from Helena, Arkansas, has been a lawyer, farmer, civil rights activist, and state legislator. Wilson borrowed money for his farm from the Farmers Home Administration between 1980 and 1982, securing the loan with a lien on his crops. Wilson attempted to avoid the government lien and was convicted in 1985 of knowingly disposing of property mortgaged to a government agency, unlawfully converting money of the United States, and conspiring to defraud the United States. See United States v. Wilson, 806 F.2d 171 (8th Cir.1986). His conviction was ultimately reversed in 1989 because of a Batson violation at his trial. See United States v. Wilson, 884 F.2d 1121 (8th Cir.1989) (en banc). Wilson subsequently pleaded guilty in 1990 to five misdemeanor counts of converting property mortgaged or pledged to a farm credit agency and converting public money to personal use and was sentenced to imprisonment and probation.

Because of his conviction, Wilson was suspended from practice by the United States District Court for the Eastern District of Arkansas in January of 1991, pending the outcome of any disciplinary proceedings. The court referred the matter to the Arkansas bar authorities, specifically James Neal, the executive director of the Arkansas Supreme Court Committee on Professional Conduct (the Committee). The Committee decided that Wilson's conduct warranted disbarment. After Wilson refused to voluntarily surrender his license, the Committee filed a complaint for disbarment in the Phillips

County Circuit Court. All of the circuit judges in that circuit recused themselves, and the Chief Justice of the Arkansas Supreme Court assigned a circuit judge from another circuit to hear the case. This circuit judge dismissed the complaint in 1993 on the ground it was time-barred, a ruling that was reversed by the Arkansas Supreme Court. See Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994) (Wilson I).

The crux of Wilson's federal case stems from what happened when the case was remanded by the Arkansas Supreme Court to the Phillips County Circuit Court. The appointed circuit judge recused himself because of his disagreement with the supreme court's opinion. The supreme court subsequently appointed another outside circuit judge, John Lineberger, to hear the case in 1994. Wilson moved for Judge Lineberger's disqualification on the basis that there was a new circuit judge in Phillips County who had not recused himself who should hear the case. That judge was Olly Neal, an African-American, who had been elected in 1992 in a minority-majority district, newly created pursuant to a consent decree in a Voting Rights Act lawsuit. Neal was Wilson's former law partner and one of the attorneys who had represented Wilson in his criminal case. Neal also testified at Wilson's federal trial.

Judge Lineberger denied the disqualification motion on January 5, 1995, and set a trial date of June 13, 1995. At Wilson's instigation, a hearing was set before Judge Neal. Following the hearing, Judge Neal ruled on May 24, 1995, that he had jurisdiction. He then decided the merits of the case, concluding that Wilson's conduct warranted only a letter of reprimand. The Committee sought a writ of certiorari

from the Arkansas Supreme Court. The supreme court issued the writ on June 12, 1995, ruling that Judge Neal did not have jurisdiction and quashing Judge Neal's orders. See Neal v. Wilson, 321 Ark. 70, 900 S.W.2d 177 (1995) (per curiam) (Wilson II).

On June 13, 1995, before Wilson's trial began, he removed the case from Judge Lineberger's court to the district court, citing 28 U.S.C. § 1443(1) as the basis for removal. Wilson filed a counterclaim and third-party complaint against numerous state officials, including Neal, the members of the Committee, the justices of the Arkansas Supreme Court who formed the majority in Wilson II, Judge Lineberger, and John Doe defendants. Wilson alleged violations of his federal constitutional and statutory rights and sought declaratory and injunctive relief. See Neal v. Wilson, 920 F.Supp. 976, 982-83 (E.D.Ark.1996) (Wilson III).

The case was assigned to United States District Judge George Howard, Jr. After briefing, Judge Howard recused himself because of the district court's initial reference of Wilson to the state bar authorities for disciplinary action in 1991 and directed that the case be assigned to a judge from outside the Eastern District of Arkansas. Judge Waters was subsequently assigned the case.

The district court first concluded that Wilson's attempted removal of his disbarment case was improper. Even assuming that Wilson had pleaded causes of action under 42 U.S.C. § 1981 or the Voting Rights Act, the court concluded that Wilson had not met the requirements for section 1443(1) removal because he had failed to show that he would be

unable to adequately enforce his rights in state court. The court also concluded that the removal was untimely and remanded the case to state court. See Wilson III, 920 F.Supp. at 983-86. With regard to the merits of Wilson's complaint, the district court concluded that it should abstain under the Younger abstention doctrine. It also concluded that the Rooker-Feldman doctrine precluded what would be essentially federal court review of the Arkansas Supreme Court's decision regarding Judge Lineberger's appointment. The court then dismissed Wilson's complaint. See id. at 986-91. Wilson subsequently moved for reconsideration and requested that Judge Waters recuse himself for the same reason given by Judge Howard. The district court denied both motions.

On appeal, Wilson argues that he met the requirements of section 1443 for removal, that his petition for removal was timely, that the district court erred in abstaining, that the district court erred applying the Rooker-Feldman doctrine, and that Judge Waters erred in refusing to recuse himself.

II. Discussion

A. Removal/Remand

We may review the district court's remand order because this case involves a section 1443 removal. See 28 U.S.C. § 1447(d); Doe v. Berry, 967 F.2d 1255, 1257 (8th Cir.1992) (per curiam). We conclude that the district court properly remanded Wilson's case to the state courts because Wilson's notice of removal was untimely; alternatively, the district

court correctly concluded that Wilson did not meet the requirements for removal under section 1443(1).

Wilson admits that he was required to file his notice of removal "within thirty days after receipt . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is . . . or has become removable." 28 U.S.C. § 1446(b). Wilson argues that the relevant "order or other paper" was the Arkansas Supreme Court's June 12, 1995, opinion in Wilson II affirming Judge Lineberger's appointment and quashing Judge Neal's orders. We disagree. As the district court stated, the Arkansas Supreme Court's opinion in Wilson II affirming the validity of its own prior action did not convert an otherwise unremovable case into a removable one. See Wilson III, 920 F.Supp. at 986. The thrust of Wilson's complaint is that his rights were violated when the Arkansas Supreme Court appointed Judge Lineberger to hear his case. The Arkansas Supreme Court made this appointment in May of 1994, and Wilson did not file his notice of removal within thirty days of his receipt of this order. Even reading the record in the light most favorable to Wilson, the thirty-day limitation period began running no later than January 5, 1995, the day on which Judge Lineberger overruled Wilson's motion for disqualification in which Wilson raised his argument that Judge Neal had jurisdiction over the case. Wilson's June 13, 1995, notice of removal was thus untimely by a factor of months.

Even assuming that Wilson's removal notice was timely, the district court correctly ruled Wilson had not established his eligibility for a section 1443(1) removal. Under that

statute, Wilson must show that he relies upon a law providing for equal civil rights stated in terms of racial equality. See 28 U.S.C. § 1443(1); Georgia v. Rachel, 384 U.S. 780, 792, 86 S.Ct. 1783, 1790, 16 L.Ed.2d 925 (1966). Although we doubt that Wilson has done so, we will assume, as did the district court, that Wilson has sufficiently asserted causes of action under the Voting Rights Act and 42 U.S.C. § 1981. See City of Greenwood v. Peacock, 384 U.S. 808, 825, 86 S.Ct. 1800, 1811, 16 L.Ed.2d 944 (1966) (Voting Rights Act and § 1981 fall within statutory definition of § 1443(1)). Wilson must show that he is denied or cannot enforce that right in state court. See 28 U.S.C. § 1443(1). "Removal is warranted only if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts." Rachel, 384 U.S. at 800, 86 S.Ct. at 1796. Further, in "the unusual case . . . 'an equivalent basis could be shown for an equally firm prediction that the defendant would be "denied or cannot enforce" the specified federal rights in the state court.' " See Johnson v. Mississippi, 421 U.S. 213, 219, 95 S.Ct. 1591, 1595, 44 L.Ed.2d 121 (1975) (quoting Rachel, 384 U.S. at 804, 86 S.Ct. at 1796).

Wilson has not met these stringent requirements. He has not shown that there is a state law preventing him from raising his federal claims in state court, nor has he shown the basis for an "equally firm prediction" that he will be unable to protect his federal rights in state court. As the district court stated, Wilson's contentions regarding the defendants "boil down to little more than a belief by him that, since the state actors disagree with him and his lawyers, they must have racially discriminatory motives." Wilson III,

920 F.Supp. at 990. If, as Wilson fears, the Arkansas state courts do not respect and enforce his federal rights, Wilson's proper course of action is to seek direct review in the United States Supreme Court. See Berry, 967 F.2d at 1258 ("The issues involved . . . can be decided in the state courts, which have equal responsibility for ruling on federal constitutional issues. Berry may then seek review of any adverse rulings in the United States Supreme Court.").[3]

---

3. Wilson makes assertions regarding the motives and possible bias of the state bar authorities. As the Supreme Court has stated:

> It is not enough to support removal under § 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial. . . . The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the State any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under § 1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.

City of Greenwood, 384 U.S. at 827-28, 86 S.Ct. at 1812-13.

Appendix E

B. Wilson's complaint

The district court lacked subject matter jurisdiction to consider the claims Wilson pleaded in his second amended complaint because of the Rooker-Feldman doctrine. We recently summarized the Rooker-Feldman doctrine:

> The Rooker-Feldman doctrine states that district courts do not have subject matter jurisdiction over challenges to state court decisions in judicial proceedings. Rooker v. Fidelity Trust Co., 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 103 S.Ct. 1303, 1311, 75 L.Ed.2d 206 (1983). The only court with jurisdiction to review decisions of state courts is the United States Supreme Court. A federal district court has jurisdiction over general constitutional challenges if these claims are not inextricably intertwined with the claims asserted in state court. A claim is inextricably intertwined if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. In other words, Rooker-Feldman precludes a federal action if the relief requested in the federal action would effectively reverse the state court decision or void its ruling.

Charchenko v. City of Stillwater, 47 F.3d 981, 983 (8th Cir.1995) (citations omitted). See also Bechtold v. City of Rosemount, 104 F.3d 1062, 1065-66 (8th Cir.1997).

Appendix E

Wilson's complaint repetitively recites the facts of the case and alleges that these facts show violations of the Fifth, Fourteenth, and Fifteenth Amendments, the Voting Rights Act,[4] 42 U.S.C. §§ 1981, 1983, 1985, and 1986, and Arkansas state law. As relief, Wilson requested removal of the Phillips County Circuit Court case and the Arkansas Supreme Court case to the federal court "for a determination of the constitutional rights of [Wilson]," an injunction preventing the defendants from further seeking Wilson's disbarment, an order dismissing the disbarment complaint filed against Wilson, and recognition "that the Order of Judge Neal entered in this matter [is] a legal judgment."

Wilson's complaint does not present a general challenge to the constitutionality of the Arkansas procedural rules regarding attorney disbarment. See Feldman, 460 U.S. at 486, 103 S.Ct. at 1316-17 (district courts may entertain general challenges to state bar rules). In our view, the district court could not review Wilson's claims and grant relief without effectively reviewing and reversing the decisions of the Arkansas Supreme Court in Wilson I and Wilson II, particularly its conclusions that the disbarment action was not barred by the statute of limitations and that Judge Lineberger, rather than Judge Neal, had jurisdiction over Wilson's disbarment trial. Thus, the district court lacked jurisdiction under the Rooker-Feldman doctrine to consider Wilson's complaint because his federal claims are inextricably intertwined with his state case.

---

4. Wilson's Voting Rights Act claim is based on an alleged violation of the consent decree in Hunt v. Arkansas, No. PB-C-89-406 (E.D.Ark. Sept. 24, 1992).

Alternatively, to the extent that any portion of Wilson's complaint survived the jurisdictional bar of the Rooker-Feldman doctrine, the district court correctly ruled that Younger abstention was warranted under the standard of Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). The only Middlesex element in dispute is whether there is "an adequate opportunity in the state proceedings [for Wilson] to raise constitutional challenges." Id. at 432, 102 S.Ct. at 2521. Wilson has not pointed to any state obstacle preventing him from raising his federal claims in the state proceedings. See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14, 107 S.Ct. 1519, 1527, 95 L.Ed.2d 1 (1987) (burden on plaintiff to show that state procedural law barred presentation of claims); Hirsh v. Justices of Supreme Court of California, 67 F.3d 708, 713 (9th Cir.1995). The Arkansas Supreme Court has in the past considered constitutional claims presented during attorney disciplinary hearings. See Arens v. Committee on Professional Conduct, 307 Ark. 308, 820 S.W.2d 263 (1991); Sexton v. Arkansas Supreme Court Comm. on Professional Conduct, 299 Ark. 439, 774 S.W.2d 114 (1989); Eaton v. Supreme Court of Arkansas, 270 Ark. 573, 607 S.W.2d 55 (1980). Because Wilson has the opportunity to raise his federal claims in the state proceedings, Younger abstention is appropriate. See Middlesex, 457 U.S. at 432, 102 S.Ct. at 2521; Hirsh, 67 F.3d at 713.

Wilson argues that the state authorities have acted in bad faith by seeking the reversal of two circuit court decisions favorable to Wilson and that the conduct of the state authorities and the Arkansas Supreme Court shows that Wilson's federal rights will not be honored in state court.

See Middlesex, 457 U.S. at 435, 102 S.Ct. at 2523 (bad faith, harassment, or extraordinary circumstances justify exceptions to abstention). We remind Wilson that we may not engage any presumption "that the state courts will not safeguard federal constitutional rights." Id. at 431, 102 S.Ct. at 2521; Hirsh, 67 F.3d at 713 ("one who alleges bias 'must overcome a presumption of honesty and integrity in those serving as adjudicators' ") (quoted cases omitted). We agree with the district court that Wilson has proffered no evidence of bad faith, harassment, or other circumstance that might render abstention inappropriate. The Arkansas Supreme Court reversed the two previous circuit court rulings on state law grounds, and Wilson has the opportunity in the current state proceedings to raise his federal claims. As we noted above, the district court characterized Wilson's contentions of bad faith by the defendants as "little more than a belief by him that, since the state actors disagree with him and his lawyers, they must have racially discriminatory motives." Cf. Peterson v. Sheran, 635 F.2d 1335, 1340 (8th Cir.1980) (disbarred lawyer argued Minnesota Supreme Court biased against him and he would not have "real opportunity" to raise claim before that court; allegations not sufficient because he alleged only general bias because of previous proceedings in case and hypothetical reactions of state judges to his public criticism).[5]

---

5. We also agree with the district court that our case of Lewellen v. Raff, 843 F.2d 1103 (8th Cir.1988), is distinguishable from the present case.

C. Recusal

Wilson argues that Judge Waters should have recused himself for the same reason given by Judge Howard. We disagree. Judge Howard recused himself because the District Court for the Eastern District of Arkansas had referred Wilson's disciplinary matter to the Arkansas bar authorities. Because Judge Waters was not involved in that decision, the rationale for Judge Howard's recusal does not apply to him. We presume that Judge Waters is impartial, and Wilson has not met his " 'substantial burden of proving otherwise.' " In re Kansas Pub. Employees Retirement Sys., 85 F.3d 1353, 1358 (8th Cir.1996) (quoted case omitted).[6] Accordingly, Judge Waters did not abuse his discretion in refusing to recuse himself. See id. (citing 28 U.S.C. § 455(a)).

III. Conclusion

Resolution of this matter should take place in the courts of Arkansas, not the federal courts. The judgment is affirmed.

---

6. We also disapprove of Wilson's decision to wait until after Judge Waters had issued an unfavorable ruling before moving for recusal.